CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

NEW ORLEANS.

NOVEMBER, 1879.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,
HON. A. DEBLANC,
HON. W. B. SPENCER,
HON. E. D. WHITE,
} *Associate Justices.*

The following four cases, delivered at the last New Orleans term of the court, are now published by order,

No. 6830.

OLYMPE BOISSE AND HUSBAND VS. MRS. H. P. DICKSON, ADMINISTRATRIX. ET AL.

A demand that the administratrix of a succession, and widow in community, shall file an account, so that the plaintiff, who claims to be the transferree of one of the heirs, may obtain a settlement of the rights involved in the unsettled community and succession, is of a probate character, and hence, irrespective of the amount in dispute, is within the jurisdiction of the parish court.

A judgment of a United States court, when made the basis of an action in a State court, may have its validity collaterally inquired into by those not parties to it.

In order to made a valid seizure and sale of the undivided interest of an heir in a succession, it is not necessary to reduce to possession any specific property of the succession.

If the return of the sheriff, or marshal, shows a seizure of the whole interest in the succession, and his advertisement for sale of the interest includes a complete list of every article of property and every right included in the inventories of the succession, it is sufficient.

The seizure of the interest of an heir in a succession can not embrace that portion of her interest which the heir has previously received and disposed of.

In a suit which seeks to subject to seizure the interest of an heir in a succession, a receipt of the heir acknowledging that she had been paid in full for her interest, although not full proof as against third persons, is yet relevant, and therefore admissible in evidence.

The husband of one of the heirs of a succession can testify for or against a co-heir, for or against a creditor of the co-heir, touching the latter's interest in the succession.

As between appellees the decree of the lower court can not be revised, amended, or reversed.

The surviving widow is the legal usufructuary of the estate of her children inherited by them from their father, and as such she cannot be compelled to give security.

The interest of an heir in a succession is his share of the residuum, after the payment of the debts of the succession.

APPEAL from the Parish Court of Bossier. *Fort*, J.

Land & Taylor, and *Thomas J. Semmes* for plaintiff and appellant.

Nutt & Leonard and *H. M. Spofford* for defendant.

J. D. Watkins for defendants.

The opinion of the court was delivered by

DEBLANC, J. Michael Dickson died in the parish of Bossier on the 30th of March, 1865, leaving seven children born of his marriage with Hanna P. Palmer, his surviving widow, to wit:

1. M. A. Dickson, now dead, and represented by four minors, who are under the tutorship of their mother, Mattie Lipscombe.
2. Mary E. Dickson, the wife, by a first marriage, of J. B. Trigg, and—by her second marriage—of General Gideon Pillow, of Tennessee.
3. Victoria H. Dickson, the wife of Captain S. M. Thomas.
4. Emma Dickson, the wife of R. McDowell.
5. Lizzie Dickson.
6. M. Hugh Dickson.
7. Palmer Dickson.

In 1871, Olympe Boisse—the plaintiff—obtained against the said Mary E. Dickson, in the Circuit Court of the United States, sitting at New Orleans, a judgment for $4231.40, with interest. In 1872, on the 9th of February, this judgment was recorded in the parish of Bossier, where the succession of Michael Dickson is opened.

Under an *alias* writ of *fi. fa.*, issued on the judgment thus obtained and recorded, a deputy marshal seized—as alleged in his return—"all the right, title, interest, claim and demand of the said Mary E. Trigg in and to the succession of her father, Michael Dickson, the same being the undivided one seventh interest in all the movables, immovables, rights and credits belonging to and composing said succession."

This seizure was made on the 12th of May, 1873, more than eight years after the death of Michael Dickson, fifteen months and three days after plaintiff's judgment had been recorded in the parish of Bossier.

What—under the alias writ and the assumed seizure, did the deputy marshal advertise for sale? "All the right, title, interest and demand of Mary E. Trigg as an heir in and to the succession of her father,

Michael Dickson; said right, title, interest and demand being the undivided one seventh interest in and to the property, as found in the inventories of said succession, on file and of record in the parish of Bossier." This recital in the advertisement is followed by a long and descriptive list of the property mentioned by the deputy marshal "*as found in the inventories of said succession.*"

We know what the deputy marshal alleges that he has seized; we know what he has advertised for sale. After that seizure and that advertisement, what did he sell, what did he adjudicate to plaintiff? In his own words: "the property heretofore seized under the writs." In the deed from the marshal to Olympe Boisse, he refers to the property so seized and adjudicated, as that described *in the inventories of the succession*, and—in that deed—he transferred to said adjudicatee, Mrs. Trigg's undivided interest in and to the property referred to by him.

As transferree of that interest, plaintiff applied to the parish court of Bossier to compel the widow of Michael Dickson to render an account of her administration of said deceased's succession, and to give—as usufructuary—the security which—she alleges—is required by law.

Mrs. Mary E. Trigg, through a curator, and the other heirs of Michael Dickson, by the usual citations, were made parties to plaintiff's suits against the aforesaid widow and administratrix.

On the 7th of February, 1876, the widow excepted to plaintiff's action, on the ground that the sale from the marshal to her is an absolute nullity, because at the date of, and long anterior to said sale, Mrs. Trigg had applied for a discharge in bankruptcy, and—by order of a competent court—all proceedings against her person and property were stayed.

This exception was referred to the merits, and Mrs. Widow Dickson, her daughters Emma and Lizzie, and the curator appointed to Mrs. Pillow, filed an answer in which they deny:

1. That at the date of the sale from the marshal to plaintiff, Mary E. Trigg had any interest in the succession of her father.

2. That under said sale, Olympe Boisse acquired any right authorizing her to demand and require an account of the administration of said estate.

The validity of the sale from the marshal to plaintiff is also disputed on the ground that, even if Mrs. Pillow had not then received more than her share of her father's succession, no legal seizure was made or attempted to be made of said share.

In addition to these grounds, Mrs. Dickson contends that, as plaintiff's action is for one seventh of the succession of Michael Dickson, of which she holds possession, and to the usufruct of which she is entitled during her life, and as that seventh interest is worth more than

five hundred dollars, she can be disturbed in her possession, but by an action before the District Court; and that—as to this controversy—the parish court was without jurisdiction *ratione materiæ* and *ratione personæ*.

These exceptions and defences were not sustained by the lower, court, and Mrs. Dickson ordered to render an account of her administration. In accordance with that order, she filed an account in which she charges herself with the value of the personal property belonging to the community which heretofore existed between her and her late husband.....$45,198.50

and claims for debts paid by her and for which said community was liable, a deduction of.....$28,812.42

leaving subject to her own right as a partner in the community, and as usufructuary, a balance of.....$16,386.08

In the petition to which her account is attached, she alleges that she has paid, in addition to the debts carried in said account, large claims due by the aforesaid community, the amounts of which she was unable to ascertain within the time allowed her for a compliance with the order of the court.

She avers—besides—that, up to 1872, the succession of Michael Dickson has paid for and advanced to Mary E. Trigg, in cash, $29,999.74—in kind, two hundred bales of cotton, valued at ten thousand dollars, and which—according to the evidence—were worth and brought more than twice their alleged value.

Hugh and Palmer Dickson, two of the heirs of the deceased, without acknowledging plaintiff's right to the share of their sister in their parent's estate, joined in her opposition to their mother's account, and they pray—with plaintiff—that their mother be charged with $125,000, the presumed proceeds of sales of cotton, and, in addition, with $274,450, for property received, used and disposed of by her, and which—they state—belonged to the succession of her husband.

Plaintiff's action is neither the petitory, nor the possessory action. She is not seeking the recognition of a disputed title, the recovery of a contested possession, the immediate enforcement of a claim now demandable. She is simply asking, of the administratrix of the succession of Michael Dickson, to place on record the evidence of what the deceased has left, what has become of the property which has passed under her control as administratrix, what she has paid for her husband's succession or the community, what she holds as usufructuary, a settlement of their respective rights in an unsettled community and unsettled succession. To that extent, her action is essentially of a probate character, and to that extent was properly sustained.

Michael Dickson died rich: his children were educated partly in

the United States and partly in Europe: they may still be, but—at his death—they certainly were closely united among themselves, trusted in each other and trusted in their mother. They then believed and had reasons to believe that the fortune inherited and acquired by their parents was amply sufficient for his widow and heirs. That fact, which not only retarded, but prevented a settlement between them, is fully established by the uncontradicted declaration that "on consultation with the family, the opening of the succession of Michael Dickson was opposed, on the ground that they desired the property and family to remain as their father had left them."

The succession was thereafter opened, but only on representation that it was indispensable for the purpose of authorizing some one to pay its debts, collect what was due to it, and more particularly to have ginned, baled, shipped, and sold the cotton on hand. In conformity with that representation, Mrs. Dickson was appointed as administratrix of said succession, in the month of September, 1865; inventories were taken of its property and assets, and Capt. Thomas chosen by the administratrix to act as her agent.

That agent prepared the cotton for market and shipped it to New Orleans. There, from the 23d of February, 1866, to the 24th of February, 1868, eight hundred and forty-one bales were sold as belonging to the estate of Michael Dickson, for $87,593.94. A member of the commercial firm by whom it was sold testifies that the United States Revenue tax thereon must have aggregated the sum of $7500. That other and additional costs were incurred, there can be no doubt, for a lot of said cotton was seized by federal officers assisted by federal soldiers, and that seizure must have entailed on the interested parties serious troubles and expenses. Those costs and expenses constitute a charge against the proceeds of the sales of the cotton.

After the death of her father, and *before the appointment* of her mother as administratrix, Mrs. Mary E. Trigg took from one of the plantations two hundred bales of cotton, which were seized in New Orleans by an agent of the United States; of the lot thus seized—said agent consented to release one hundred and eighty-eight bales, which were afterwards sold, for account of Mrs. Trigg, by A. F. Dunbar & Co. From that sale she realized, after payment of all charges, the sum of $19,526.60, which—added to the advances and payments made to and for her, $29,999.74, gives a total of $49,526.34, received by her from her father's succession, *before* plaintiff had obtained a judgment against her, *before* the seizure by plaintiff of her hereditary rights, and—as a matter of course—before plaintiff had acquired any title to her share in her parent's succession.

Three of the defendants, besides Mrs. Trigg, contend that the title

relied upon by plaintiff is an absolute nullity. If it were, plaintiff replies, it is derived from the execution of a judgment rendered by a federal court, and its validity cannot be inquired into either by or before a State tribunal. In this, she is certainly mistaken. That judgment is not binding on those who were not parties to it, and—as it is made the basis of her action, its validity may collaterally be inquired into, as—otherwise—the State tribunal would have had to suspend its proceedings, in order to await the trial by and adjudication of the federal court on only one of the branches of an entire litigation.

In this case, which of the two tribunals has cognizance of the subject matter? It is not the federal, it is the State court, and that court alone can, legally, pass upon and determine every branch, every incident of this controversy. This is indisputable. Plaintiff claims under a seizure by, and a sale from the marshal. Defendants deny the fact of this seizure, the validity of the sale. Must that fraction of the suit be dissevered from the main action, and submitted to the Circuit Court of the United States? Such a construction would destroy the indivisibility of the action, and compel a strange retailing by courts of dissimilar jurisdictions, of separate decisions on distinct branches of an indivisible suit. This position is not sustained by any law, any jurisprudence.

8 L. R. 459. 11 L. R. 384, 390.

Is the title from the United States marshal to Olympe Boisse a valid title? Several of the defendants contest both its validity and its existence. They allege that, on the 21 of August 1873, the day mentioned in the return on the writ as that on which Mrs. Trigg's interest in her father's estate was adjudicated to plaintiff, the marshal had no writ in his hands, and was without authority to sell. This objection is not supported by the evidence adduced on the trial: the federal officers proceeded under a writ regular in substance and in form.

Did the officers of the federal court make a legal seizure of the rights adjudicated to plaintiff? On the first perusal of their proceedings, the impression left on the mind is that they did not. Their return certifies that one of them "seized and *took into possession* the title, interest, claim and demand of Mrs. Trigg, in and to the succession of her father, the same being the one undivided seventh in all the movables, immovables, rights and credits belonging to and composing said succession."

In their advertisement of the sale, they added to that description that the interest so seized was "Mrs. Trigg's interest in and to the property as found in the inventories of the succession of Michael Dickson, on file and of record in the parish of Bossier," and then gave a complete list of every article of property and every right included in said inventories. In the deed from the marshal to plaintiff, he transferred to

her "Mrs. Trigg's interest in *the property* heretofore seized under the writ, and described in said inventories."

There was no actual seizure of any specific property, no seizure of either land, mules, cattle, corn, bacon or fodder, which at that time had partly perished or been disposed of, but a seizure of Mrs. Trigg's interest in her parent's estate, and that interest was not, could not have been, as stated by the deputy marshal, reduced to possession. Does that inconsiderate statement vitiate the advertisement and the sale? It does not. Had it been omitted, were it now stricken out, and disregarding it—as we do—the fact remains "that Mrs. Trigg's inheritance was seized, advertised for sale and sold."

To give to the public and to the bidders a clue to the value of the property seized and advertised for sale, it was proper to publish a list of said property, to mention the nature of the rights, interest, claims and demands which had been levied upon. An inheritance consists, not only of rights, but of liabilities, and—as far as practicable—when an inheritance is seized—the amount of its liabilities should be ascertained and announced, in order to assist in its appraisement, warn purchasers, and realize its value.

4 A. 295.

The creditor can and should seize the entire interest of the heir in the succession: but can he seize what the heir has previously disposed of, what has passed to third parties, what has ceased to exist? Can that creditor, more than eight years after the opening of the succession, proceed to seize, sell, buy and claim—in whatever hands they may be—every article of property, every one of the rights which composed the succession, when it was opened? He cannot.

In support of that unreasonable proposition, we are referred to the decision of this court in the celebrated case of Virginie Ternant against Evariste Boudreau—6 R. R. p. 488—in which it was held that, because Ternant had purchased Boudreau's interest in the succession of Dorothée Legros, the wife of the first, the mother of the other, Ternant, by virtue of that sale, was entitled to diamonds and ornaments of gold, which had been deposited in the coffin which contained the remains of the wife and mother, when those diamonds and ornaments were recovered from the felons who had desecrated the tomb and robbed from the coffin.

Between plaintiff's case and that relied upon by her counsel, there is a marked difference. Boudreau sold at private sale, immediately after the death of his mother. Imagining that the planks of the coffin, the wall of the tomb, excluded from his contract what he and Ternant had therein deposited, or rather not thinking at all of the jewels which—under their own instructions—were sealed against the effects of any contract, he sold—without exception—his hereditary rights in his

mother's succession. Those of Mrs. Trigg in her father's estate, were seized when? More than eight years after the death of her father, more than eight years after she had acquired the power of disposing of her inheritance, more than eight years after she had taken and disposed of at least a considerable portion of that inheritance.

Here, we are told by counsel that "a succession is an immovable, and that—to affect third parties—the transfer of a share in a succession must be made by a written act, recorded as the law prescribes." This is an extraordinary mistake, which in the whole course of our own jurisprudence, is sustained by only one, a dissenting opinion, which stands almost unnoticed in our esteemed reports. The action to recover an entire succession is classed, in our Code, as an immovable action, from the object to which it applies—but the succession, as such, is not an immovable. "If it were," as remarked by Mr. Justice Spofford, "if we could disregard the elements which enter into its composition, we should be forced to the conclusion that, when it is entirely composed of personal effects—not one of which could be separately mortgaged—the heir could yet mortgage the ideal being representing those effects."

12 A. p. 684.

That construction is sanctioned by the letter and spirit of our legislation: it provides that "tutors of minors and curators of persons interdicted have the right to institute in their names suits for the partition of the effects of successions, *whether movable or immovable*, falling to said minors or interdicted persons." In the English text, the qualification "movable and immovable" might be applied to the word "effects." The French text repels such an interpretation; "les tuteurs des mineurs et les curateurs des interdits ont le droit de provoquer, en leur noms, le partage des successions—*soit mobilières, soit immobilières*, auxquelles ces mineurs ou interdits sont appelés."

Code of 1825, Article 1235.

"Ainsi—said Marcadé—que l'on entende par action la réclamation même, la demande en justice—ce qui est exact—soit que l'on entende le droit d'obtenir jugement et résultant de la réclamation, ce qui serait inexact, on n'arrivera jamais à trouver, dans l'action, un bien spécial et distinct du droit qui a engendré cette action, et sur lequel le jugement a prononcé ou doit prononcer. L'action ne peut pas être un autre bien que le droit qui la produit."

Marcadé, Vol. 2, p. 361.

As long as a succession remains opened and undivided, as long as it does not cease to be a succession, before its acceptance, or during a litigation—between contending parties—as to whom it shall descend, a succession is an entirety. The creditors of those to whom it fell, can and should seize, before the partition, not the separate interest of their

debtors in any separate article of property, but their undivided share of the entirety, their inheritance, with its rights and its liabilities. When the title to the succession is not disputed, as soon as it is accepted, either expressly or impliedly, the succession disappears and the co-heirs become co-proprietors of movables and immovables.

In the case already cited by us, Chief Justice Merrick held "that when the heir is present and recognized, or when the creditors have accepted the succession for him by the seizure of his interest in it, the succession—even if it be under administration—must be considered as in possession of the heir." At the death of Michael Dickson, Mrs. Trigg was present, recognized as one of his heirs, accepted his succession, tacitly at least, and disposed—if not of the whole—of a considerable portion of her share in the same, and this, several years before plaintiff's debt had accrued against her.

In vain would it be contended that plaintiff's right to inquire into and annul any real transaction between Mrs. Trigg and her parents, accrued before plaintiff became a creditor of Mrs. Trigg, before the surviving parent was legally informed—by the seizure or otherwise—of the existence of appellant's claim, and Mrs. Widow Dickson should have been allowed to prove what she has paid to, what was taken and received by her daughter from the estate of her father before the seizure of her daughter's inheritance.

As urged by plaintiff's counsel, from the date of her husband's death, Mrs. Dickson was *entitled* to the usufruct of his share in the community of acquets and gains; but, when did she claim *and exercise* the right to which she was thus entitled? Was it at the death of her husband? It was not—for, then, the mutual understanding, the expressed intention of the mother and the children, was that the property should continue to be held in common between them, "that property and family should remain as the father had left them." Under that understanding, the heirs of age took and were allowed what they wished, the minors were sent to school, first in the State, afterwards in Europe.

In an instrument attached to one of the many bills of exception which swell the record, Mrs. Trigg acknowledged—on the 10th of January, 1867, that she had settled with her mother for her rights in her father's estate, and that she had been paid in full for her interest as an heir. In regard to plaintiff—as a third party—this instrument was not—of itself—an absolute proof of the verity of its naked and unsworn statements; but—coupled with the evidence which the widow attempted to adduce to support its contents, it was relevant to, and an important part of the proof authorized by the issues presented. It was not the evidence of a transfer of any incorporeal right, of any personal or real property, but an acknowledgment, by Mrs. Trigg, that she had received,

in cash, in kind, in some way, an amount which was, or which she considered equal to her share in the succession of Michael Dickson, and—for that legitimate purpose, it should have been admitted by the lower court.

Plaintiff's counsel objected on the trial, to the testimony of Capt. S. M. Thomas, the husband of one of the heirs. It is true that he could not have been called upon to testify for or against the interest of his wife, but he could certainly testify for or against the interest of the mother, sisters and brothers of his wife, for or against the creditor of Mrs. Trigg, and—so far as concerns Mrs. Dickson and plaintiff, the only parties who can claim, in this court, the maintenance, reversal or amendment of the judgment appealed from, his testimony was properly received.

When she submitted to the court her account as administratrix of her husband's succession, Mrs. Widow Dickson reserved the right to thereafter show that she had expended and paid, for said estate, large amounts not included in said account, and her reservation was sanctioned by the decree appealed from. This was irregular. If Mrs. Dickson was unable to ascertain, within the delay fixed by the judge, the amount of those expenses and payments, she should have applied for and been allowed an additional delay to procure that necessary information. We can not, however, deprive her of the right so reserved.

In this case, the only appellant is Olympe B isse; all the other parties are appellees—and, as between the latter, the decree of the lower court can neither be revised, amended or reversed. For that reason, it is useless to discuss, in detail, the balance of the bill of exception: for the purpose of the revision of the only branch of this controversy which we can determine, they are virtually decided by the views already expressed.

We are unable to concur with the parish judge in all of his conclusions. He held that Mrs. Widow Dickson is chargeable with the whole of the property of the succession, which—he considers—was left in her possession at the death of her husband. It is shown that at that time—by consent of the interested parties—the whole of said property remained, as common property, in the possession of the widow and of the heirs of age—and, since then—where is it? It partly passed, and for a nominal price—in the possession of the children who have coalesced with plaintiff, in her action against their mother.

The evidence does not support the assertion that Mrs. Widow Dickson disposed of twelve hundred bales of cotton belonging to the community, and that she was liable for their value, fixed by the lower court at one hundred and thirty-eight thousand dollars. Of the cotton raised during the war on the three plantations—less that which was stolen,

contributed to the Confederate government, or taken by Mrs. Trigg—every bale was shipped to the city, and consigned to only one commission house—there sold for account of the estate of Michael Dickson, and every cent of the proceeds of the sale carried to the credit of said estate. Does not this important fact corroborate the declaration "that the family and property were to remain as the father had left them?"

As regards said cotton, its value and the number of bales shipped and disposed of, Mrs. Dickson's liability—either as administratrix or usufructuary—is fixed, not by the doubtful estimates made several years after the sale and at hundreds of miles from the market to which it was sent, but by the best, the most satisfactory evidence—the account rendered by the commission house to which it was consigned and by whom it was sold. If any more was raised, ginned, baled, shipped and sold, how imagine that the heirs or the creditor would have failed to discover?

When, after the days of abundance and luxury, the expensive excursions at the North and in Europe, the brilliant and costly festivities of the city, trouble and anxiety crossed the threshold of the home filled—until then—with all that fashion commanded and gold could procure, when the last check was drawn on the last fund, Mrs. Dickson who had been parsimonious but to her and prodigal towards her children, remained—according to the evidence—what she seems to have ever been, an affectionate mother. To her sons Palmer and Hugh, she gave what they asked: they proposed to lease one half of one of the plantations. She leased it to them for five years, at the rate of fifty dollars per annum, and—on the trial—offered to prove, by one of the lessees, that said rent was worth fifty times the price agreed upon.

This, she was not allowed to do: but, as neither she nor her children appealed, it is useless to decide whether that evidence was properly or improperly rejected. We refer to it only so far as it bears on that branch of the controversy which is before us, as a presumption that Mrs. Dickson was not disposed to favor any one of her children to the detriment of the others, and that—at a period of distress and need—she was striving to do for the youngest what, in time of affluence and prosperity, she has done for Mrs. Trigg.

The cotton and funds left at the death of Michael Dickson, did not—at that date—pass into the exclusive possession and become the absolute property of the widow, as usufructuary, but—by mutual agreement—remained, until they were disposed of and exhausted, in possession of the widow and heirs, and if—at the date of plaintiff's seizure—Mrs. Trigg had already taken her share of said cotton and funds, her creditor can not justly expect to be allowed to again exercise an extinguished, a satisfied right. If—as alleged—she took more than her share, she is liable—for the excess—to her mother and co-heirs, and

not, as urged, to her mother alone. If, at the end of her mother's usufruct, there remains unsettled and unsatisfied any portion of Mrs. Trigg's inheritance from her father's estate, that portion, with its charges—whatever they may be, shall—at that date—pass to plaintiff, as Mrs. Trigg's assignee.

We can not assume original jurisdiction of any part of this case, and order an inventory, to fix—as between these parties—the nature and amount of what was seized from the heir and bought by the creditor, of what—at that time, theft, war and overflows had left of the succession of Michael Dickson; but we can and do suggest the important necessity of such an inventory, or of some proceeding, to preserve the evidence of what remained of said succession, of what plaintiff may hereafter be entitled to, and of any charges outranking her claim, and which then affected the acquired inheritance.

To establish those facts, the marshal's seizure, his return and his deed are as insufficient as incorrect.

There remains to be decided whether Mrs. Dickson—as usufructuary—is or is not bound to give security to her children, or to plaintiff, as assignee of the hereditary rights of her daughter? She is not. Under our Code, fathers and mothers have *during their marriage*—the enjoyment of the estate of their children. *After* the dissolution of the marriage, by the death of one of the parties, the survivor—under the statute of the 25th of March, 1844—has the right to hold in usufruct, *during his or her natural life*, so much of the share of the deceased in the community property as may be inherited by the issue of their marriage. In either case, the usufruct so granted to the parents is a legal one, and the Code specially provides: "that neither the father nor the mother having the legal usufruct of the estate of their children is required to give security."

R. C. C. 223, 540, 541, 560.

Acts of 1844, No. 152.

The distinctions between the usufruct conferred by the Code, and that conferred by the statute, are plain, palpable distinctions. The first is established on only the estate acquired by the child during his parent's marriage, and otherwise than by inheritance from them: that one lasts until the majority or emancipation of the child. The other is established on property which—before the Statute of 1844, was not subject to that usufruct, which—up to 1844—the parents held as tutor or tutrix, or which passed to the child—when he was of age—free from that charge. That usufruct does not cease at the emancipation or majority of the child, but only when the parent dies or enters into a second marriage. That Statute adds to the rights, not to the obligations of a favored class of usufructuaries.

Had Mrs. Trigg retained her title to a share in the community, she could not have required from her mother—as usufructuary of that share—the security which, on application of Mrs. Trigg's creditor—her mother was ordered to furnish. That condition is not imposed by the Statute, and it is expressly excluded by the Code. A stranger may acquire the inheritance, the creditor may dispossess the child, but whatever the changes that may happen in the ownership of the property, the parent's usufruct, until the parent's death, remains linked to the divested title, to the transferred inheritance.

R. C. C. 617.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court in favor of Olympe Boisse and against Hannah P. Dickson, be and the same is hereby annulled, avoided and reversed, and this case remanded to be proceeded with—as between said parties—according to law and the foregoing opinion: the costs of the appeal to be paid by Olympe Boisse.

Mr. Justice EGAN took no part in the decision.

Mr. Justice EGAN having been consulted in regard to the settlement of the succession of Dickson by some of the heirs, to the knowledge of counsel on both sides, reserved the right to recuse himself at any stage of this case at the time it was originally heard, and having taken no part either in the decision already rendered or in granting a rehearing, now recuses himself in this case.

ON REHEARING.

MANNING, C. J. The crucial question, the answer to which determines this controversy, is—what did the Marshal seize and sell, and what did the plaintiff acquire by the adjudication to her?

He did not seize the share and interest of Mrs. Trigg in any particular tract of land, or in any specific movable, nor did he seize her share of the aggregate of all the lands, or her portion of all the movables. It was her interest in the succession as an entirety that was seized, and that is, her share of the residuum, which can only be known after all the debts, charges, and liabilities are deducted from all the assets and property. The thing seized was intangible, incorporeal—an ideal and judicial being or object, which might prove to be valuable or valueless according to circumstances. It might be that future developments would show that there is no residuum, or that if there were a residuum, Mrs. Trigg had already received, used, and consumed her portion of it.

This becomes apparent, if it needs any demonstration, by considering what object, thing, or property is appraised when one is proceeding

to sell the undivided share of an heir in a succession. It would not be possible to separate each piece of property from the other, to appraise it, and thus assume the heir's interest in it to be a certain proportion of its value. Nor would it answer to pursue that mode, and adopt that rule, with all the several kinds of property, and aggregate them all, and say the heir's interest in the whole is a certain proportion, unless you also estimate the deductions that are to be made. Practically, it may be necessary to pursue this, or some like method, in order to ascertain a value for the residuum, for you must know the value of each property before you can know the value of the aggregate of them all, and you must know what deductions are to be made therefrom, before you can know what is the residuum, or any part thereof. But that is only a mode of arriving at the result—a means to an end—processes of calculation to help one to ascertain a determinate sum—stepping stones by using which you reach a spot where there is sure footing.

The arithmetical machinery which you use to enable you understandingly to appraise so complex an object of seizure as an undivided and unsettled interest in a succession, must not make you confound the object that is finally appraised with the several and different objects, the value of which you have had to consider, before you could ascertain the value of that resultant of them all. You must necessarily know what is the value of these tangible objects—the various pieces of property, the various kinds of assets, rights, etc., the various charges and diminutions, etc.—before you can know at what sum to appraise this intangible object, which has been seized.

The plaintiff's counsel lose sight of this when in their brief for a rehearing, they treat the receipt or acquittance of Mrs. Trigg to her mother as a conveyance or attempted conveyance of land. In both cases—the thing seized, and the thing acknowledged to have been received—is a certain share or interest in an incorporeal right.

If a succession is composed of many kinds of property—lands, movables, rights and credits, money—and heirs, who are competent to act, partition it among themselves, it cannot be doubted that one might take her share wholly in money, and another wholly in land, or other property. Mrs. Trigg, whether from choice or necessity, took hers wholly in money, or cotton which immediately produced money. It is not yet established with absolute certainty that she has received the whole of her share, but it is probable that such is the fact. Her receipt to her mother, the administratrix of the estate, and the usufructuary of one half of the property, is in full payment, and it appears to be conceded in argument that if what she has received is chargeable to her as a part of her share, that it will turn out to be even more than her portion of the succession.

If then she had already received her full share of the succession, whether in one kind or in many kinds of property, before the seizure was made by the marshal, what did the plaintiff buy but the right her debtor had at the time of seizure? What rights did the plaintiff acquire by the purchase, other than those her debtor already had? And if Mrs. Trigg, in a forced partition at her instance of the succession property, and a compulsory account provoked by her of the administration, would be compelled to submit to having her share reduced by the sums she had already received, and if it turned out that she had received all, and would not be permitted to take more—why should not the plaintiff be bound to do the same, seeing that she could do only that, and no more, which Mrs. Trigg could do, whose rights she had acquired, and in whose place and stead *quoad* the succession she stood.

Our opinion is that the plaintiff has acquired only such interest as Mrs. Trigg, now Mrs. Pillow, had in the succession of her father at the time the seizure was made, and if she had received already a sum of money, or property which produced money, equal to the value of her share of the succession, then she had no interest further therein.

We are asked to put an end to this controversy by a present decree, but there is not complete evidence in the record what the value of the succession was at the time of the seizure of Mrs. Trigg's interest, and although she has receipted to the administratrix for the whole of her interest, the verity, good faith, and correctness of that receipt is open to attack by the plaintiff, who may be able to establish that, over and above the sums and property already received by Mrs. Trigg, there is still something now coming to her as an heir of her father. If there be anything still due her, the plaintiff is entitled to it. If there is not anything due her, the plaintiff has acquired nothing by her purchase. We are compelled to remand the case. Therefore

It is ordered and adjudged that our former decree remain undisturbed.

Mr. Justice EGAN recused himself in this case.

No. 7100.

STATE VS. JACK TOBY.

A service of the duly certified list of the jurors for the term at which the accused was tried, made on the accused during that term, and made two weeks before his trial, is a sufficient compliance with the law requiring such service to be made two days before the trial.

A defendant on trial for burglary and grand larceny, has no right to introduce in evidence his own voluntary statement taken before the magistrate. Decision in State vs. Vandergriff, 23 Annual 95 affirmed.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker*, J.

G. N. Ogden, Attorney General for the State.

Wm. Reed Mills, for the defendant.

The opinion of the court was delivered by

SPENCER, J. The defendant was convicted of burglary and grand larceny. His counsel relies on two grounds for reversal of the sentence—

First—On the ground that no duly certified list of the jurors for the December term was ever served upon him. There were two services of said list upon him—one on the 5th December, and one on the 14th December. His trial commenced on the 19th. The last copy served has no visible impress of the seal of the Court. The former has, but not a very distinct one. It is objected that neither is sufficient: and that even if the copy served on the 5th be properly sealed, it was not good for a trial commencing on the 19th, since the law says the service must be made "*two days* before the trial." We think that if the accused had two weeks instead of two days, to inform himself about the panel, he ought to be satisfied. The greater delay includes the less.

Second—The second exception is taken to the refusal of the Judge to allow the accused to introduce in evidence his own voluntary statement taken before the magistrate. We have been earnestly pressed to reconsider this question, and to overrule the case of "State vs. Vandergriff," 23 A. 95, which decides against its admissibility. A careful consideration leads us to the conclusion that the decision referred to is correct, and rightly interprets the legislative will.

It is therefore ordered and decreed that the judgment appealed from be affirmed.

DISSENTING OPINION.

DEBLANC, J. The voluntary declaration of an accused party, made to, received and certified by a judge or magistrate, "*shall be evidence before the grand and petit jury.*" These are the words of the law; they

are not restrictive; and—to hold that they mean "evidence for exclusively the State, against exclusively the accused is to restrict—howsoever plausibly—their clear and indivisible meaning.

If the only evidence which the prisoner is allowed and induced to give, can be used but against him and when he confesses the commission of a crime, and never in his favor, when it tends to disprove or justify the commission, is he not—indirectly at least—and under that construction of law—impelled, by a legislative artifice, to become a State witness and to give evidence against himself?

His unsworn declaration may be entitled to little or no credit, may be invariably suspected; but—nevertheless—that which, in his own defence, he could not be denied the privilege of stating orally, he can state in writing to the jury. Otherwise, no prisoner can be induced or expected to make a voluntary declaration, to unsheath a weapon, the handle of which would always be in the grasp of the prosecuting attorney, and the point to his breast.

I respectfully dissent from the opinion and decree of the majority.

MARR, J. I concur in this.

Rehearing refused.

No. 7408.

INTERDICTION OF SCOTT WATSON. INTERVENTION OF MRS. WEATHERLY, ET AL.

The interdiction of a person will not be pronounced on the evidence of two medical experts, neither of whom had ever conversed with him until the day before the filing of their report of his condition, and who had had no opportunity to test his mental condition.

Mere weakness of mind in the defendant will not warrant a decree of interdiction when such a decree is not asked for by any of his relatives, and when, in view of the evidence adduced, it does not appear that the interdiction is necessary, either for the protection of his person, or his property.

APPEAL from the Parish Court, Tensas, *Bondurant*, J.

Reeve Lewis and *E. Howard Farrar*, curator for Scott Watson, defendant and appellant.

J. W. Montgomery, Steele & Garrett for intervenors, appellees.

The opinion of the court was delivered by

MANNING, C. J. Scott Watson, the elder, died in 1859, leaving a widow and three minor children, the youngest of whom died shortly afterwards. His estate was valuable, consisting chiefly of a cotton plantation in Tensas parish, and he owed no debts. The mother was confirmed as natural tutrix of the children, and an inventory was made

of the succession property. In 1860, she married John R. Weatherly, having first convoked a family meeting, which advised that she be retained as natural tutrix of her children, but that she must give a bond according to the requirements of law relative to dative tutors, and she accordingly executed a bond as tutrix in the sum of one hundred thousand dollars.

The two surviving children of the Watson marriage are a son, now called Scott, whose interdiction is now sought, and a daughter, Ida, now Widow Robert Weatherly. In 1866 these children were taken to France by their mother to complete their education. Scott was then about nineteen years old, and was a promising youth—'the brightest boy in school,' says his cousin as a witness—'both mentally and physically sound,' says another. Two years afterwards, he was brought home in a condition, as is now charged, of mental idiocy and imbecility, and has so remained ever since.

In 1878, the parish judge of Tensas, reciting that Scott Watson is afflicted with a permanent and complete idiocy, and subject to an habitual state of imbecility, to such an extent that he is now and has been for more than ten years entirely unable to take care of his person and property, and that he has real and personal property of great value as well as large sums due him from his mother, and whereas his interdiction has never been solicited by any of his relatives, whose duty was to institute proceedings to that end, and it is made the duty of the judge to pronounce the interdiction *ex officio*, it was ordered that cause be shewn why the decree should not be made, both by Scott himself, and by an attorney at law who was at once appointed to represent him. The proceeding is taken under art. 384 of the Civil Code, and is as follows;—If the person who should be interdicted has no relations and is not married, or if his relations or consort do not act, the interdiction may be solicited by any stranger, or pronounced *ex officio* by the judge after having heard the counsel of the person whose interdiction is prayed for, whom it shall be the duty of the judge to name, if one be not already named by the party. New No. 391.

E. H. Farrar, Esq., the counsel appointed by the court to represent the proposed interdict, answered by a general denial, and requiring proof of the judge's allegations. About two weeks thereafter, Scott Watson answered through "counsel appointed by himself," as is stated therein, denying that there is any necessity for his interdiction, and praying, should the court decree otherwise, that he be placed under the curatorship of his mother. At the same time, the mother and sister intervened, the former alleging that for many years she has had charge of her son, taking care of him, and protecting him with the attention and solicitude which a mother alone can bestow, and that there is no

necessity for the appointment of a curator whereby she will be deprived of the care and supervision of his person. The sister reiterates her mother's allegations, and charges that the proceedings are wholly unnecessary, and are the result of impertinent and officious intermeddling by outsiders, who have no interest in the matters involved. She further avers that she is her brother's presumptive heir, as her mother is his forced heir, and she desires the appointment of her mother as curatrix, if one be deemed necessary.

Upon these pleadings the case was tried, and judgment of interdiction was pronounced.

We have heretofore had occasion to consider the difference between idiocy, imbecility, and insanity, and to define these three mental conditions. Francke's case, 29 Annual, 302. Insanity is not attributed to the subject of the present proceedings. His interdiction is demanded because of idiocy and imbecility. The allegation is, that he is "afflicted with a permanent and complete idiocy, and is subject to an habitual state of imbecility." It is very clear that he is not an idiot. Idiocy is marked by congenital deficiency of the mental faculties, says a writer on this subject. 2 Taylor's Med. Jurisp. 502. The first appearance of mental lesion was about the time he had attained majority, and while pursuing his studies in France, with the same promise of a brilliant future that his school-fellows had noticed in his early youth. The cause for the interdiction must be imbecility.

Two physicians were appointed to examine him. One of them had never conversed with him 'before yesterday,' the day of the examination, which lasted an hour and a half. He describes him as very weak both in body and mind, having comparatively no mind, and would suppose from the nature of the disease, that he would at times be violent, although that form of the disease is not so apt to produce violence as some other forms—thinks he would only be violent when irritated or interfered with—the disease is rather an atrophy of the mind than melancholia, and is incurable. The other physician had known Watson longer—dressed a wound in his hand once, but had little or no conversation with him at the time, and consequently could form no idea of his mental condition, and this was the extent of his intercourse with him until the examination of 'yesterday'—says he was quiet on both occasions, and judging from his condition yesterday, should think he never had mind enough to take care of his person and property. The first physician says that Watson has not now mind enough to take care of his person or property. They both join in a formal report that Watson has that form of insanity described in medical jurisprudence as dementia.

It is manifest that if the necessity for interdiction rests solely upon the testimony of the two medical experts, no sufficient cause is shewn

for a decree which entails such serious consequences upon the subject of it. Neither of them had had opportunity to test the mental condition of the imbecile. Neither of them had ever conversed with him except during the examination of the previous day, and the opportunities for forming an opinion upon one's permanent mental condition, which often displays deceptive manifestations, were conspicuously meagre.

Other testimony is in the record, from which we gain much information of his condition. Mr. Clinton, an intelligent lawyer, speaks from knowledge of Watson in his earlier youth, and before there was any mental lesion, as well as from personal observation of him since. The mother and sister also testified. We gather from the evidence that Watson is in the same condition as was Mrs. Francke. Early after his mental disturbance was manifested, he was submitted to the late Dr. Warren Stone for examination, who advised that restraint of any kind should be avoided, and the largest liberty allowed to him. This course was pursued, and with apparent benefit. He ate with the family—slept in a chamber adjoining his mother's—had perfect freedom of action, and required only the supervision that a child does. The only vicious or violent propensity he exhibits is cutting his clothes, but he is tractable and never wild. Some years after Dr. Stone's examination, he was placed in a Retreat near Baltimore, but was removed therefrom by the advice of the physician in charge of it, who saw that even a partial restraint was hurtful, and commended Mrs. Weatherly to renew her former personal supervision and control of him. Last summer he was sent to a place in Mississippi in the highlands, and remained until late in the autumn, and returned in better condition than he has exhibited since his malady began. Everywhere he manifests a very warm love for his mother, and submits himself readily to her direction. "It would be more than cruel, says the sympathetic sister, to take him away from her. It would be death."

The matter for our decision now is, not whether he shall be taken away from his mother, but whether he is in that condition which requires the interposition of a court to pronounce his interdiction. We do not think he is in such condition.

The case is almost a complete parallel to that of Mrs. Francke. The malady of both is the same. Neither is able to take care of his person or of his property. Restraint, if prolonged, would unquestionably in either case produce dementia, and the experiment, tried with both, exhibited the same result.

We infer from a part of the testimony, that the fact that neither Mrs. Weatherly nor her husband had ever filed an account of Scott and Ida Watson's property and revenues, is supposed to create the necessity for interdicting the former. As a consequence of this, and to rebut the

presumption of mal-appropriation or mismanagement of the property, it is in evidence that the property is managed with unusual skill and judgment, and it is worthy of remembrance in this aspect of the case that his sister, who has the same interest in the property, does not call for an account, nor allege misappropriation of its revenues, and she, her mother, and the half-brother of the second marriage are the heirs of Scott, and the only persons who could be injured by wasting his revenues, or deteriorating, or injuring his property. If it were otherwise, we should hesitate before pronouncing a sentence, which might incalculably affect the proposed interdict for worse, and could not ameliorate his physical or mental condition. If the lessons of experience, taught by subjecting him to different modes of treatment, and the advice and opinion of those physicians, in whose care he was placed with the special view of ascertaining what was necessary for his well-being, are to be considered, we must conclude that he is not labouring under insanity (which indeed is not charged in the pleadings) but rather that he is afflicted with a permanent feebleness of intellect, which only requires uncongenial treatment to be developed into dementia.

This subject is attracting a large share of the attention of philanthrophists and legists now, and courts are proceeding in such matters with more caution and circumspection than formerly. We perceive no good reason for interdicting this unfortunate man. His person could not be better cared for than it now is by his mother. His property seems to be so little in danger that his co-heir, equally interested with himself, is satisfied with its present management, and those who will inherit it upon his death, are making no complaint. Therefore

It is ordered, and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favour of the defendant and intervenors, the costs of appeal to be paid by the defendant.

DISSENTING OPINION.

WHITE, J. I cannot agree with the conclusion of the Court in this case, and express my dissent with much hesitancy, but to my mind the proof in the record is so clear and the law applicable to it so free from ambiguity, that I feel compelled by a sense of duty to state the reasons by which my mind has been convinced that the interdiction should be pronounced.

What is the issue before us? The Parish Judge of Tensas of his own motion, after reciting that it had come to his knowledge that Scott Watson, a resident of his jurisdiction, who was the owner of large estates, was insane and incapable of managing either his person or property, instituted proceedings for his interdiction. To this proceeding the mother and sister of the defendant intervened and resisted the inter-

diction. Was the action of the Judge warranted by law? The question does not in my mind admit of discussion in face of the plain text of C. C. 391, saying: If the person who should be interdicted has no relations and is not married, or if his relations or consort do not act, the interdiction may be solicited by any stranger or pronounced *ex officio* by the Judge after hearing the counsel of the person whose interdiction is prayed for, whom it shall be the duty of the Judge to name, if one be not already named by the party. The question of procedure being thus determined, what is the fact as to insanity *vel non*? To my mind there is no doubt of the overwhelming and uncontradicted proof of insanity. To make this obvious, let us examine the proof in the record. What does that proof show?

The father of Scott Watson died years ago, leaving a widow and three children. The unfortunate subject of this litigation grew up full of promise; having been sent to school in France he was after a short absence brought back, if not a maniac at least a person of insane mind. What do the witnesses say? Let us examine the testimony of each and every one, so as to leave no room for misconception.

1. Two physicians appointed by the court to examine him both testify and report him as insane, as incompetent to exercise volition, as utterly incapable of taking charge of his person or property.

2. Alex. Reed, who had been employed to take care of him, describes him as a person of unsound mind, as an insane person, unable to take care of his person and his property.

3. Wm. Watson, who had been employed to take charge of the young man on a trip made by him to Mississippi, describes him as insane, as at times frantic, at others quiet, but never either rational or capable of taking care of his person or his property.

4. Robert Murdock, an old resident of the parish, who has known him from his boyhood, testifies that he is insane and completely incapable of volition.

5. Eli Tullis, who has known him from birth, testifies to the same effect.

6. J. T. Watson, a cousin, describes him as an insane man, never in his moments of partial tranquillity able to take care of his person or property. In speaking of his condition, he says: "He is perfectly wild at times; he has tried to kill his mother, and she has so told me." The Parish Judge testifies to the insanity from personal knowledge; says he was impelled to institute the proceedings from a sense of duty, having seen the young man in an apparently neglected condition. Such is the proof for interdiction; could it be plainer? Is it in any way rebutted? I think not. The mother and sister, who oppose the interdiction, both in their testimony admit the insanity, but think the insane young man will

be better cared for by his mother than any other person. T. P. Clinton, Esq., testifies to an interview, or rather a meeting with him; he mentions him as then reasonably quiet. He concludes his testimony by saying: "He is certainly incapable of managing his own estate, and requires more supervision than a ten-year old boy." Such is every particle of testimony in the record. If it does not establish insanity beyond peradventure, what could prove it? What is the law? "No person above the age of majority who is subject to an habitual state of imbecility, insanity, or madness, shall be allowed to take care of his person and administer his estate, although such person shall at times appear to have the possession of his reason." C. C. 389. If the defendant be insane, how can the mandatory provisions of the law be avoided without substituting the volition of the judge for the will of the law-maker? True, the mother does not desire the interdiction, but that her wish or desire ought not to control is rendered, it seems to me, self-evident by keeping in mind the words *shall be allowed*, already referred to, and by considering that even a stranger may provoke interdiction, if the relatives do not act. But, it is said, if the defendant is in the care of his mother, no interest of his person requires his interdiction. The wise provisions of the Code as I read them are placed on no such narrow basis. They contemplate giving to the unfortunate person who may be bereft of reason the benefit of every safe-guard, without regard to individuals or relationship; they provide the inflexible and disinterested will of the law, as a shield, as a protection where the natural will no longer exists. Their policy is obvious, founded in a knowledge of human nature, the result of the accumulated experience of all ages, to obviate all danger of temptation; they provide that the person whose insanity is such as to render him incapable of taking charge of his person or property is to be directed not by any one or two of his relations who might in any given case be interested in the perpetuation of this insanity, but that the courts shall with the family meeting guard his person and administer his property. In the present case it may be that the disease is incurable, and that its victim will be happier in the hands of his mother than elsewhere. Does it follow that a decree of interdiction will remove him? He is the owner of a large and fruitful estate, and the law has wisely and humanely provided that the revenues of the property of the interdict shall be expended in operating his cure or in mitigating his sufferings. The very object of the law in interdicting is to have such revenues applied to these desirable ends under the eye of the court, so that the person who would enjoy the revenues if no interdiction were allowed is not to judge of the necessity of their application. It is for this reason that the books speak of the decree of interdiction as a merciful decree, as one guaranteeing to the sufferer every care and hope of cure, free from the danger

which might otherwise flow from the selfishness, the depravity, the interested motives of individuals. Aside, however, from these considerations, the interdiction is in my judgment required to protect the defendant from being defrauded by any misguided exercise of his now diseased will. As by majority the law presumes capacity to contract, so it continues the presumption of capacity until destroyed by the presumption *juris et de jure*, the decree of interdiction. If to-morrow we were called upon to enforce against the defendant a contract by which he had divested himself of his heritage, would we not with the facts in this record recoil from so doing? How, however, could we escape it if we now fail to recognize that disordered will from which incapacity results? It is from these reasons that Marcadé says the law-maker has said a person deprived of reason "shall be interdicted," not only as a benefit to himself, but also as a protection to society, to avoid the pitiable spectacle of courts being made the instruments of wrong and injustice. Whatever may be the correctness of the foregoing views as to the necessity of interdiction for the sake of the person and the will of the defendant, in my mind they, even if incorrect, would not obviate the necessity of interdiction. The large estate of the defendant is shown to be in the hands of his step-father, and whilst there is a statement that the real estate appears to be in a flourishing condition, there is nothing whatever to show what is done with its revenues, or what has become of the personal estate, which was very large. This whole estate, both personal and real, in my opinion can and ought to be administered as the law requires. It is said that his mother and sister are his presumptive heirs, and they do not complain, hence there is no reason for judicial action. The law, however, is not so harsh as to consider the light of a darkened mind as gone out forever; it contemplates the possibility of a cure, and it acts with that object in view. It does not consider an unfortunate sufferer dead by anticipation, so that his heirs can take his property and administer it without bond, without supervision, without responsibility. The presumptive heirs, were such not the case, would be interested in perpetuating the mental disturbance. The mother of the young man has remarried; at the date of the second marriage the family meeting retained her in the tutorship upon her giving bond as a dative tutor. Years have gone away, the revenues of the son's estate have year by year been acquired. How disbursed is a question upon which the record is silent, and which, in my opinion, should be answered by an account rendered with the formalities required by law. For the sake of the defendant, for that of his person, his will, and his property, as also for society itself, I think the judgment of interdiction pronounced below should be affirmed.

SPENCER, J. I concur in the opinion and conclusion of Mr. Justice WHITE.

No. 7375.

G. B. SHIELDS VS. PIPES, TAX COLLECTOR.

In the absence of allegation and proof to the contrary, it will be presumed that the ordinances of a police jury which authorized the construction of necessary public works, provided for the payment of the debt thus incurred, as required by law.

Where a valid judgment against a police jury orders the latter to levy and collect a tax sufficient to pay the amount called for by the judgment, in accordance with the law then in existence authorizing the police jury to impose such a tax, a subsequent act of the Legislature repealing the law authorizing the said tax, and substituting another law which makes no provision for paying the judgment, which is still partly unsatisfied, divests the vested rights of the judgment creditor, and is therefore unconstitutional.

The parish court is without jurisdiction to enjoin the execution of a judgment of the United States Court, or of a District Court of the State.

The tax collector is incapable of standing in judgment alone, in a suit by a tax-payer to enjoin the collection of a tax levied to pay a tax. The judgment creditor, for whose benefit the tax was laid, must be made a party to the suit.

APPEAL from the Parish Court of Concordia, *Weng*, J.

Wade R. Young for plaintiff and appellant.

Will. T. Martin and *O. Mayo* for defendant and appellee.

The opinion of the court was delivered by

MARR, J. In 1874 Welden recovered judgment, in the United States Circuit Court, against the Police Jury of Concordia parish, on obligations for work done, before 1861, in building a bridge, a jail, and other public edifices. This judgment was the result of a compromise by which the debt was diminished more than one third: the interest was reduced from eight to five per cent; and the payments were divided into five equal annual instalments.

In accordance with the then existing law, act of 1869, No. 69, Rev. Stats. sections 2628, 29, 30, it was decreed that the Police Jury levy the necessary tax to meet these instalments as they should become exigible: and, as thus rendered, the judgment was "formally and fully consented to and ratified by ordinances of the Police Jury." The tax was levied and applied to the judgment until 1878, when, in consequence of the act No. 96, approved April 20, 1877, the Police Jury refused to levy it. Thereupon the judgment creditor proceeded in the Circuit Court, by mandamus. The Police Jury set up and relied upon section 103 of this act, which repealed all general laws authorizing the levy of special or judgment taxes; and restricted parochial taxation, throughout the State, to the *maximum* of one per cent, *provided*, that, on the written application of a majority in value of the tax-payers of a parish, the Police Jury shall be authorized to levy additional taxes, not in excess of five mills. On hearing the court held this act to be unconstitutional, in

so far as this pre-existing judgment was concerned; and the mandamus, requiring the Police Jury to levy the tax, was made peremptory.

Peter Young recovered judgment in the District Court of the State, for the Parish of Concordia, on the sixth April, 1877, against the Police Jury, on obligations and evidences of debt, alleged to have been for current parish expenses, for the years 1873 to 1877, inclusive. By consent the amount was made payable in five annual instalments, bearing interest at five per cent, from the date of the judgment, instead of from the maturity of the obligations, respectively, as prayed for: and in accordance with the act of 1869, then in force, the judgment ordered the parish officers, whose duty it is to assess taxes for the parish, forthwith to assess a tax, at a sufficient rate per cent, on the assessment roll of the current year, to pay and satisfy the first instalment; and to make similar assessment to meet the other instalments as they, respectively, should fall due.

In obedience to these mandates of the United States Court and of the State Court, the Police Jury, by ordinances of July 15 and August 19, 1878, levied a tax of seven and eight tenths mills, and another tax of two and one third mills, to meet instalments on the Welden and Peter Young judgments; and the tax collector was endeavoring to collect these taxes when Shields, a tax-payer, brought this suit in the parish court of Concordia, against the tax collector, and obtained an injunction arresting further proceedings as to him.

The petition charges that the ordinances and proceedings of the Police Jury and the tax collector are illegal, null, and void, because they are in violation of section 103, of the act 96, of 1877; that petitioner has already paid or tendered to the collector the amount of the general parish tax assessed on his property, ten mills, and a special parish levee tax of two mills; and that there is no special act of the Legislature, and no written application of a majority in value of the tax-payers to justify the Police Jury in imposing, and the tax collector in collecting any additional tax.

The tax collector sets np and relies upon the judgment of the United States Court, making the *mandamus* peremptory as *res adjudicata*, so far as the Welden claim is concerned. With respect to the Peter Young judgment, he denies that the act of 1877 is applicable, because:

1. The tax of ten mills is not more than sufficient to pay the current expenses of the parish; and the judgment could never be paid out of the funds produced by such assessment;

2. That the act of 1869 was in force at the time the judgment was rendered; and the Police Jury in assessing the tax complained of but endeavored to carry it into effect.

3. That the act of 1877 is unconstitutional and without effect as to

the tax levied to pay the Peter Young judgment: that it impairs the obligation and destroys his rights under it; and interposes a perpetual bar to the recovery of his judgment, and, therefore, violates the constitutions of the United States and of the State of Louisiana.

The parish judge held the act of 1877 to be in violation of art. 1, sec. 10, clause 1, of the Constitution of the United States, and art. 110 of the constitution of Louisiana; and he dissolved the injunction, and ordered the collector to enforce payment of the tax enjoined.

It will be observed that the suit is based, and the injunction was obtained, on the single ground that the ordinances of the Police Jury, and the proceedings of the tax collector, are illegal, null, and void, because they "conflict with and are in violation of the provisions of section 103, of the act No. 96," etc. The plaintiff does not attack either the Welden judgment or that in favor of Peter Young; nor could he have attacked either in the parish court, because the amount of each judgment is far in excess of the jurisdiction of the parish court; and because the action to annul a judgment must be brought in the court in which it was rendered.

The argument in this Court has taken a much wider range than the pleadings justify. Counsel for appellant contends that the presumption is conclusive, from the fact that the claims of Welden and Young have not been paid, that the debts were contracted in violation of the act of 1853, re-enacted in 1855, and in the Revised Statutes, section 2786, etc., which forbids police juries to contract any debt or pecuniary liability, without fully providing in the ordinance creating the debt, the means of paying the principal and interest. The argument is that if they had been *fully* provided for, they would have been paid.

But this is not necessarily true. It was admitted that the Welden debt was contracted when the taxable property of the parish was estimated at $14,000,000, whereas it is now only $1,250,000. The legal presumption, in the absence both of allegation and proof to the contrary, would be that the police jury did not violate the law; and that ample provision was made, in the ordinances authorizing the building of the bridge, the jail, and the other public edifices, to pay the debt thus contracted. A very low rate of taxation on $14,000,000 of taxable value, would have sufficed; but that rate would be wholly inadequate, when the taxable value was reduced to $1,250,000.

It is not possible for the police jury to know, in advance, precisely what the parish expenses for the current year will be. These expenses are provided for in the annual budget, by appropriation, out of the annual tax; and the rate of taxation is based upon the estimated amount of the current expenses, and other debts to be paid during the year. The current expenses will, necessarily, fluctuate in different

years; and they can not, in the nature of things, be provided for, in advance, otherwise than estimatively. The sum thus appropriated and raised might be ample; and yet all the current expenses of the year might not be paid, either because all the tax levied is not collected, or because the necessary expenses have been in excess of the amount fixed in advance by estimation, or because the money collected has been diverted to other uses.

The Act of 1853 can not be applied strictly to the current expenses of the parish, because the amount must always be conjectural. All that the law requires, or could reasonably require with respect to them, is, that the Police Jury shall fix, by estimation, the amount which will be required to meet the current expenses, and appropriate and levy such tax as will raise that amount. If the amount thus raised should not suffice, the only consequence would be that the police jury would be bound to supply the deficiency in subsequent annual budgets.

The fact that the judgments in favor of Welden and Young were the results of compromises with these creditors, in no manner impairs their validity. In the one case the parish obtained a large reduction of the debt, and of the rate of interest: in the other case all the interest which had accrued up to the date of the judgment was remitted; and in both cases the tax-payers were relieved of the oppressive burden of paying these judgments in full, at once, by dividing them into five annual instalments.

No such issues, however, were made in the pleadings: no such questions were passed upon by the parish court; and they can not be originated in this court. The legal presumption is that every judgment of a competent court, rendered contradictorily, is in accordance with the law and the evidence; and if the legality of the claims on which the two judgments in question were rendered could now be controverted, it certainly has not been done in this case: nor could it be done in the parish court, in a suit against the tax collector alone, on which the ordinances of the police jury levying the taxes required by the judgments, are attacked upon the single ground that they violate section 103 of Act 96, of 1877.

The judgments vested in Welden and Young, respectively, the right to be paid the amounts awarded to them, in the five instalments agreed upon. At the time these judgments were rendered the only means of enforcing the payment was that prescribed by the Act of 1869, by assessments to be made for that purpose. When the Legislature subsequently repealed all general laws authorizing the levy of a special or judgment tax, and fixed the *maximum* of parochial taxation at one per cent, a rate which, it was admitted in this case, was not more than sufficient to pay the current expenses of the parish, it either intended that

this law should apply only to judgments rendered in future, or it attempted to deprive these judgment creditors of all remedy; and to divest the rights vested in them by the judgments. It was no more within the power of the Legislature to deprive these creditors of the benefit of that part of their respective judgments which ordered the levy of the tax to pay the instalments as they should become exigible, than it would have been to reduce the amount, or the rate of interest fixed by the judgments.

In all fairness, and in legal intendment, it must be presumed that the Legislature did not intend to violate either the Constitution of the United States or of the State. The Constitution of the United States forbids a State to pass any law impairing the obligation of contracts. Art 1, sec. 10, clause 1. The constitution of Louisiana, art. 10, declares that every person, "for injury done to him in his lands, goods, person, or reputation, shall have adequate remedy by due process of law:" and art. 110 declares, that "no retroactive law, or law impairing the obligation of contracts, shall be passed; nor vested rights be divested, unless for purposes of public utility and for adequate compensation made." To apply the Act of 1877 to these pre-existing judgments, and the vested rights resulting from them, would be to violate the letter and spirit of these constitutional provisions; and would be in excess of legislative power.

The preliminary injunction should not have been granted; and it might well have been dissolved on other grounds. The enforcement of a judgment belongs to the court in which it was rendered; and the parish court had no power or authority to enjoin the execution of the judgment of the United States Court, or of the State District Court. The enforcement of a judgment can not be arrested by injunction without making the judgment creditor a party. The tax collector was incapable of standing in judgment alone in a suit to enjoin the collection of a tax levied to pay a judgment; and if the injunction had been maintained, in this case, it would have been no obstacle to a proceeding in the United States Court, at the instance of Welden, against the police jury for contempt; nor would it have prevented a mandamus, and subsequent proceeding for contempt, at the instance of Young, in the District Court, to enforce the levy and collection of the tax.

The judgment appealed from is, therefore, affirmed with costs.

Rehearing refused.

No. 6856.

BRADISH JOHNSON ET AL. VS. EDWARD BUTLER ET AL.

The third holders and owners of negotiable bonds of a parish, which were issued by the police jury in exchange for warrants of the parish that were almost entirely illegal and void, and which thus had as their consideration a debt that was only partly due by the parish, have no better right to recover on the bonds than the original holders thereof, when all of the facts and circumstances under which they acquired the bonds, raises against them a legal presumption of negligence, notice, or *mala fides*.

APPEAL from the Second Judicial District Court, parish of Plaquemines, *Pardee*, J.

E. Howard McCaleb, *Wm. H. Hunt*, and *Kennard*, *Howe*, *& Prentice* for plaintiffs and appellees.

R. T. Beauregard, parish attorney, and *Henry Chiapella* for defendants and appellees.

Cotton & Levy, *Thomas J. Semmes*, and *A. G. Brice* for intervenors and appellants.

The opinion of the court on the original hearing was delivered by DEBLANC, J., and on the rehearing by WHITE, J.

DEBLANC, J. By an act of the Legislature of the State, approved on the 25th of March 1874, five persons, to wit: the president of the police jury of the parish of Plaquemines, H. P. Kernochan, H. Mahony, Dr. Joseph B. Wilkinson, and O. B. Sarpy, were appointed commissioners, to ascertain, determine and report to the police jury of said parish, the amount of its indebtedness. Of these five commissioners, three were then members of the police jury to which they were to make their report. Those three members were Butler, the president of that body, Mahony and Sarpy. Under these circumstances, the report of the commissioners could hardly have failed to be adopted by the police jury. Those who, at that time, represented the parish of Plaquemines in the General Assembly, were Butler and Mahony, and it seems evident that one of their purposes, in urging and procuring the passage of the act already referred to, was to secure, in the board of commissioners, a majority favorable to their scheme.

In the first and the most important of the six sections of the act of the 25th of March 1874, it was provided "that the police jury be and they are hereby authorized to issue bonds of said parish, duly signed by the president and clerk of said police jury, and sealed with the seal of the district court of said parish, to the amount of the debt, as would be reported by the commissioners, payable to bearer, in ten years from their date, and bearing interest at the rate of eight per centum per annum; the interest to be paid annually. Said bonds to be in amounts of not less than fifty, nor more than one hundred dollars, and exchange-

able for any of the debts and obligations of said parish; provided that the ordinance of said police jury making provision for the issue of bonds under this act shall not have the effect of law unless it shall receive the unanimous vote of every member of said police jury; and provided further that said bonds, when issued, shall be countersigned by each and every member of said police jury, which shall be evidence of the fact that the issuing of said bonds is unanimously approved by them."

These wise provisions were intended as the passport of the act, but in reality were but vain and simulated precautions: the authors of the scheme had, and they knew it, all that they needed to carry it out: an undoubted majority in the board of commissioners and a partisan in every member of the police jury. According to their official report made to the police jury, the commissioners met at the court-house on the 1st of April 1874, a second time on a subsequent day which is not specified, and finally—to deliver their report—on the 18th of May 1874, when three of them—Butler, Mahony and Sarpy, announced to themselves, as police jurors, and—so far as it appears in the record—to another of their colleagues, that—from the 16th of August 1871 to the 17th of November, 1873—the police jury of the parish of Plaquemines, had issued certificates of indebtedness or warrants against said parish, for $92,857 20: that, after deducting those of said certificates or warrants which had been destroyed, and *approximating* outstanding claims for the years 1870, 1871, 1872 and 1873, they had found that the debt of said parish amounted, on the 17th of November 1873, to $68,491 27.

On motion of Mr. Sawyer, the parish treasurer was then authorized, by the police jury, to issue bonds of each one hundred dollars, to be exchanged against the thus rapidly ascertained, determined and announced indebtedness of the parish of Plaquemines, in conformity with the act of the 25th of February 1874. All this was done on the 18th of May, and—on that day—bonds of the required description were signed, sealed and—we presume—delivered. This extraordinary celerity in the discharge of so important a duty as that entrusted to the commission and the police jury is easily accounted for: there was, there could have been no difference of opinion between three of the members of the commission, who constituted a quorum, and those who —at that date—composed the police jury.

In alleged accordance with the act of the Legislature and the ordinance of the police jury of the 18th of May 1874, bonds to the amount of thirty-nine thousand six hundred dollars were issued, and many of these sold in the city of New Orleans, within a short delay after their delivery, at from fifteen to thirty cents on the dollar; and it is more than probable that the whole of the bonds authorized by the ordinance

would have been so issued and disposed of, were it not that, on the 10th of June 1874, several taxpayers of the parish of Plaquemines obtained from the Second District Court an order enjoining any additional issuance of said bonds and prohibiting the assessment, levy and collection of any tax to pay either the principal or interest on the same.

The grounds on which the taxpayers rely to sustain their injunction, are:

1. That the act of the Legislature, of the 25th of February 1874, is unconstitutional and void, in this:

It proposes to acknowledge debts, without even the consent of the pretended debtor.

It creates an agent without the principal's assent.

It delegates to that agent, and to be exercised *ex parte*, a power which can be exercised by only the courts of this State.

The bonds issued by the parish officers are in excess of the revenues of the years in and for which they were issued.

2. That the act of 1874 was passed in the interest of Butler, Mahony and their accomplices, to procure the issuance of bonds for debts which have never existed, and for debts which—previously—had been declared invalid by the courts of this State.

3. That the preliminaries which, according to said act, were to be, have not been performed by the board of commissioners before issuing the bonds.

I.

The evidence does not sustain the charge that any improper influence was used to procure the passage of the statute of the 25th of February 1874, and that statute—construed with regard to the objects for which it was enacted—is not unconstitutional. Those objects were—not to create any debts—but to ascertain what was then the amount of already existing debts for which the parish of Plaquemines was liable, and to authorize its police jury to settle with its creditors in bonds bearing interest and payable in ten years. The commission appointed for that purpose could not be and was not invested with the power of finally acknowledging or finally rejecting any claim, but was directed to investigate the matter submitted to their consideration and report the result of their investigation. Their report was binding neither as to any rejected, nor as to any acknowledged claim, and could have been approved or disputed by either the police jury to which it was made, the taxpayers or any creditor of the parish.

The law specially provides how and by whom the accounts against a parish shall be approved, and the only task of the commission appointed by the act of 1874, was to make out a detailed list of those who held the legal evidence of any claim against the parish. They

could not have justly denied the correctness of a bill of fees approved by a judge, nor classed as a fundable debt, one which would have been previously passed upon and rejected by a competent court. Their exclusive function was to *inspect* and report. They reported, but did they inspect?

II.

Before proceeding to examine any other question presented in this case, we have to decide whether, as contended by those who have intervened in this suit, the plaintiffs, who are taxpayers of the parish of Plaquemines, can not inquire into the consideration of the bonds held by them, the intervenors, and which they purchased before maturity. For at least two reasons, the taxpayers could, as they did, inquire into the contested consideration of bonds subscribed and delivered by their agents.

1. Those who represent a State or a parish, derive their powers from the law, and the State or parish can be bound but by those of their acts expressly embraced within the scope of their limited agency, or which—as an inevitable consequence—are inseparable from, and must invariably precede or follow the exercise of the delegated powers. Any act done beyond the scope of that agency is an absolute nullity, which may be urged and contested by the principal or any interested party; and those who purchase or discount the obligations of a parish must—at their peril—ascertain, not merely that they bear the signatures of the parish's agents, but also that, in subscribing the obligations, the agents have not exceeded their powers. How, may it be asked, can that fact be verified? It can be verified without trouble or difficulty. Whatever may be their character or extent, claims against a parish are evidenced by vouchers deposited in a specified office, and whomsoever they were—planters or brokers—those who, to pay their taxes or to speculate, intended to procure any of the bonds issued under the legislative act of 1874, were bound to ascertain—by an inspection of the law, the ordinance, the commissioner's report and, if any, the deposited vouchers—whether the bonds sought to be sold or which they proposed to buy had been issued for the consideration specified in the statute. To recover on such instruments and under the peculiar and express provisions of that statute, it is not enough to show that the police jury was empowered to issue them, it must also be shown—as the act of 1874 imperatively prescribes—that they were exchanged for debts and obligations of the parish of Plaquemines. As to plaintiffs' interest in attempting to prevent the levy of a tax to pay what they consider as fraudulent claims, there can be no doubt. It is more than a right, it is a duty on the part of every citizen to denounce, resist, pursue and defeat illicit schemes which tend to increase the burden of taxation and destroy the value of property.

III.

In the brief of plaintiffs' counsel, it is contended that the act of 1874 requires that the bonds be signed by the president and *clerk* of the police jury, and that, as those held by intervenors are signed by the president and *secretary* of that body, they are not in the form required by the act. We believe otherwise; the clerk and secretary are but one and the same person, and the bonds are certainly signed by the person designated in the statute, whose real title is that of secretary. The difference in the title mentioned in the act and that which appears on the bonds, is merely a difference in the sound of a word and not one in the capacity of the officer.

IV.

In their printed argument, plaintiffs insist that the seal of the district court, which is but dimly impressed on the bonds, was thereto affixed—not by the clerk of said court—but by one who was not the custodian of that seal, and "who had no authority to either take or use the same." The act provides "that the bonds shall be sealed with the seal of the district court," and—as it does not provide by whom this was to be done, it is manifest that it could have been done by any one under the direction and in presence of the police jury. In this respect, the law was strictly complied with.

V.

We consider as untenable the objection that "the bonds issued are in excess of the revenues of the years in and for which they were issued.' The neglect of the police jury to provide for the payment of legitimate claims existing against the parish, neither did, nor could destroy its creditors' rights. That neglect merely postponed the date of an inevitable payment; for, if—as we believe—a parish should not hesitate to spend handfuls of gold to check and prevent any arbitrary taxation of the property of its inhabitants, it should never hesitate to levy and collect the taxes necessary to compensate the services rendered by its officers, and which are indispensable to the very existence of its local government. This, on its part, is not less than an obligation, and such an obligation can not be destroyed by the neglect, omission or refusal of a police jury to provide for its satisfaction. Under no law can the agent's wrong relieve the principal of its legally incurred liabilities.

VI.

The interest coupons attached to the bonds are not in proper form: they are not signed by any member of the police jury, but by only its secretary. That is not sufficient: that interest could have been stipulated in separate and legally certified coupons, but it could not have been—as it was—stipulated in instruments which, though attached to the bonds, are distinct and disunited from them, which bear no num-

ber, no mark to identify them, to connect them with the principal obligations, and which are not signed by a single one of the police jurors, the signature of every one of whom was indispensable to their validity. In this instance, however, those coupons were entirely useless: the only interest which could have been allowed by the police jury is correctly allowed, and the terms of its payment fixed in the body of the bonds, which—without the coupons—are complete in form.

VII.

The last and most important point which remains to be examined is: "Are the bonds herein referred to without consideration, and—if they are—had the intervenors the means of obtaining full information as to that fact?" The bonds were subscribed by parochial agents: the latters' mandate was a statute printed on the backs of every one of the obligations subscribed by those agents, and—under that statute—to impart validity to those obligations—two essential conditions were required:

1. The commissioners had first to ascertain, determine and report what debts existed against the parish.

2. The report made, bonds were to be issued and exchanged for those debts.

Was this done? It may have been, but it does not appear that it was. A long and naked list, numbering six hundred and ninety claims, was prepared by Patrice Leonard and Armand Lartigue, who had been employed by the police jury, then partly composed—as already stated, of three of the commissioners, and of two other parties, one of whom was not present at the session of the 18th of May 1874, and signed the bonds at Mr. Butler's house. That signature, given without a prior examination of the reported claims, constitutes—nevertheless—the last instalment of the unanimity required by the act of 1874, in the police jury's action concerning the issuance of the bonds.

Shortly after these too hasty and unmatured operations, the bonds of a parish, whose property is valued at two millions five hundred thousand dollars, were sold to brokers in the city at from fifteen to thirty per cent. This fact, we admit, is not of itself sufficient to destroy their title to the negotiable bonds, bnt it was certainly sufficient to have put those brokers on inquiry, and to charge them with notice of every legal objection that might be urged against the validity of those instruments; for—as said by the Supreme Court of the United States, in Marsh vs. Fulton County, "this is a case where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them, as to justify the issue of the bonds."

10 Wallace, 683; 2 Otto, 595.

In his book on negotiable instruments—sect. 777—Mr. Daniel says: "If the amount which the holder offers to take for the bond is totally insignificant as compared to its face value, it might be implied notice that there was something wrong about it, and if he took it without inquiry, he should not be protected. There is no conflict between this view and the cases in which it was held that gross negligence will not of itself be sufficient to impair the purchaser's title. This is not merely gross negligence, but may be regarded as willful or fraudulent blindness, and abstinence from inquiry so great as to amount to evidence of bad faith. For it is the obvious suggestion of reason that a *bona fide* owner would not throw away his property for a mere song, and that the holder acted in bad faith when he acquired it for comparatively nothing."

The bond or warrant of a State or a parish is more safely guaranteed than the note of the richest bank of the world, and—except in times of general disaster—a State or a parish, administered by faithful and competent officers, should ever be ready to pay at its maturity, and dollar for dollar, every one of the warrants issued under their authority and representing an honest claim. Those who, either justly or unjustly, so violently suspect the validity of obligations due by the whole of the taxable inhabitants of a State or parish, as to purchase them for an insignificant fraction of their expressed value, can not reasonably expect that the suspicion that they thus cast on their validity, shall not follow them in their own hands and after a transfer. If they did, their expectation would be deceived: the rule is "that the consideration of such a transfer must be—not only apparently valid—but it must also be valuable. Otherwise, it does not protect the holder against prior equities existing between the immediate parties to the paper."

Edwards on Bills and Notes, second edition, p. 354, 355.

Had intervenors referred to the commissioners' report, and this—under the act of 1874—they could have neglected to do but at their risks, they would have found:

1. That—on the first of April 1874—three of those commissioners met and "begged Mr. Lartigue, who was to be assisted by Mr. Leonard and themselves, "to make out a statement of the affairs of the parish of Plaquemines."

2. That, on the 18th of May, the commissioners again met, and submitted a report based partly on a statement made by Mr. Lartigue and partly on their own *approximation*, in which they declared that—on the 17th of November 1873—the parish debt amounted to $68,491 27.

3. That, in the statement which accompanies the commissioners' report, one party—the sheriff—is classed as the holder of seventy-eight claims against the parish, four for $25, twelve for $50, three for $200, and the balance—except two—for $100 and more, which may be due and

perhaps properly approved, but which—unexplained as they are in the statement—could not authorize the issuance, and do not establish—even partly—the consideration of the bonds. The only remark which follows one of them is "*costs for prisoner to New Orleans.*"

The most of six hundred and ninety claims carried on the statement as those of the sheriff, are, mere figures, without dates, specifications or details, and—as a whole—that statement is, not only not supported, but contradicted by the evidence.

Leonard testified that—in the space of eight months—from June 1871 to March 1872—the police jury of the parish of Plaquemines issued for forty thousand dollars of what is there known as the red-back warrants, which—in January 1876—were, by this court, declared unauthorized by any law and invalid. The statement prepared by Lartigue, with the assistance of Leonard, embraces—not only eighteen thousand dollars of destroyed warrants for which bonds were issued, but the parish indebtedness, as therein fixed, is—though not altogether—almost entirely composed of the red-back warrants, previously declared unauthorized and invalid, and which—regardless of the decree of this court—were exchanged for the now disputed bonds. To fix that indebtedness, Lartigue and Leonard got their data from stub-books, memoranda from the treasurer's office and "*vouchers kept down there by the committee.*" Mr. Butler is the only commissioner who aided them; but what he did is not shown.

Referring to the estimate of parish liabilities, plaintiffs' counsel asked Lartigue: "How did you make it out?" "From the post-book and a statement I had already made for a committee appointed, eight or ten months before, to investigate what settlement of the parish debt could be effected." "You made that estimate out of the presence of the commissioners, did you not?" "Yes, sir, out of their presence." He alone signed that estimate, and—it seems evident—he alone, occasionally assisted by Mr. Leonard, prepared it, and—really—when? Before the passage by the legislature of the act of 1874; for—after the promulgation of the act, he was only ten or twelve days engaged in reviewing and—we presume—copying the statement which he had made eight or ten months before.

The general rule is that, when a negotiable instrument has passed in the ordinary course of business into the hands of a *bona fide* holder, for a valuable consideration, without notice, the defendant can not avail himself of objections founded on the illegality of the instrument in its inception. This rule—however—has never been so stretched as to cover and protect the unauthorized acts of a clearly defined and limited agency: those who purchase, discount, or—in any way—take instruments subscribed and put in circulation by an agent, are always pre-

sumed to have informed themselves as to the nature and extent of the mandate under which those instruments were issued. Whether they do or not, and in whatsoever hands the negotiable paper may have passed, the principal can—under all circumstances—contest every act done beyond or in violation of the authority which he delegated.

In this instance, the report and statement introduced by the intervenors themselves, do not establish that the commissioners have, as they were bound to do, ascertained and determined, according to either the letter or spirit of the statute of 1874, the liabilities and indebtedness of the parish of Plaquemines; they merely reported without inspecting. To justify the issuance of the bonds, their report should have contained a detailed statement of every claim, to whom and for what they were due, the dates when they accrued, whether they were already approved when submitted to them, or merely acknowledged by them after the submission. The report should also have been accompanied by vouchers supporting every claim, and—in the absence of the original vouchers—by the creditor's affidavit or any other substantial proof. We can not—on the unsworn, naked, incomplete, dateless and unexplained statement of one man, lightly adopted by a commission, howsoever respectable that commission or that man may be—hold an entire community liable for thousands of dollars.

We, therefore, conclude:

1. That it does not appear that the indebtedness of the parish of Plaquemines was ascertained and determined, as required by the statute of 1874.

2. That the ordinance of the police jury of the 18th of May 1874 was prematurely adopted, and the contested bonds prematurely issued.

3. That the interest-coupons attached to said bonds are invalid and void, and that the holders of those merely apparent obligations can recover neither on the bonds nor on the coupons.

4. That an injunction properly issued to restrain any additional issuance of said bonds, their exchange for any pretended indebtedness of the parish of Plaquemines, and the assessment, levy and collection of any tax to pay either the principal or interest on any of said bonds.

It can not be denied that—in 1874, said parish was largely indebted. Up to at least that time and for a period of several years, its affairs were—it seems—administered with an unparalleled carelessness. Its warrants, numberless as the leaves in the spring, were exchanged for its bonds; and its bonds—then as thereafter—sold and purchased for a tittle—were partly used to pay an ever-increasing tax. In his settlement, the collector who preceded Lartigue, returned to the police jury—in evidence of claims against the parish, an amount of $40,000, and he—Lartigue—out of two settlements of thirty-two or four thousand dollars made by him as

treasurer, received—in cash—from five to seven hundred dollars, and the balance in warrants. This leaves the not unreasonable impression that the parish of Plaquemines may still be indebted to its officers and employees for services rendered prior to 1874. If so, those who now represent it, should not hesitate to ascertain and acknowledge its lawful liabilities and provide for a satisfactory settlement of the same. As, however, neither its original and real creditors, nor the transferrees of the latter, are or could have been concluded by the judgment of the lower court, as to any right or action which they may have acquired against it, before or since the issuance of the condemned bonds, we consider it useless to change or amend said judgment, which is affirmed with costs.

ON REHEARING.

WHITE, J. After a careful re-examination of this cause we have concluded that our former decree was correct and should be adhered to:

1. Because the bonds were issued in exchange almost entirely for warrants, called "red-back warrants," previously stricken with nullity by decree of this court.

2. Because, even if the commissioners were authorized to fix the amount of parochial debt by including therein whatever of valid debt may have entered into the outstanding and declared illegal warrants, as a matter of fact they did not so do, but, on the contrary, made the illegal warrants the measure of debt without reference to the *quantum* of legal consideration merged or apparently merged in the illegal warrants.

3. Because finding this state of equities, which we deem adequate to prevent recovery in the hands of the original holders, we do not think the holders now before us have shown that they are holders under such circumstances as to entitle them to the immunities of the law merchant. We say "have not shown," for we think the equities having been affirmatively established the burden was on them, under the pleadings and law, to have made such proof as would remove the claim in their hands from the reach of such established defenses, which must otherwise prevail. Daniels on Negotiable Instruments, number 515, p. 610.

In reaching this conclusion we do not take alone the vileness of the price as creating a legal presumption of negligence, notice, or *mala fides*, but all the facts and circumstances of the case, among which are:

1. The vileness of the price and the absence of all proof that the securities were regularly and authoritatively quoted.

2. The existence of the previous adjudication of this court recognizing the nullity of a large portion of the outstanding paper of the parish of Plaquemines.

3. The shortness of time elapsing between the illegal issue of the bonds and the obtention of the injunction herein.

4. The defects in the bonds themselves.

5. The fact that the intervenors were brokers and dealers in securities and more likely to have been on their guard and held to a greater degree of diligence in order to shield themselves from the consequences of undue laches.

Reaching these conclusions, we deem it unnecessary to pass upon whether if the intervenors were holders under such circumstances as to cover them with the shield of the commercial law they would be held only to look to the legal power of the commissioners, as taught by so many recent cases decided by the Supreme Court of the United States. The doctrine of power, as thus applied, we take to be not a restriction on or enlargement of the fundamental principles of the law merchant. In other words, a doctrine teaching not that one who is not a third holder for value and before maturity, in the legal sense of the term, is only chargeable with inquiry as to the power to have issued the securities, but that one who is such holder is bound, under all circumstances, to take notice of the power by which the securities were issued; such power being the measure of his right to recover, all other obstacles or equities being removed in consequence of his possessing the legal character of a third holder.

Of course, we understood our former decree as reserving any right of action for any legal consideration which may have seemingly been merged in the illegal bonds, or which had previously been ostensibly merged in the warrants declared to be illegal; our opinion then and now being that the non-existence of the bonds places the parties, in legal contemplation, in that position, as to rights and obligations, which they would have held had the bonds never been issued; saving, of course, such rights as passed to the holders of the bonds, and their consequent ownership of such prior legal rights absorbed by the bonds or practically merged in them.

It is therefore ordered that our former decree remain undisturbed.

Mr. Justice DeBlanc adheres to his former opinion.

No. 7525.

CITY OF NEW ORLEANS VS. RHENISH WESTPHALIAN LLOYDS ET AL.

An act of the Legislature which declares that no municipal corporation shall assess any license-tax on certain persons over $500, and prescribes that the act shall take effect from and after its passage, can not be construed as retroactive. It applies only to the future assessments of such a tax, and hence does not repeal any municipal ordinance assessing a larger tax, which was enacted by the corporate authorities before the passage of the legislative act. Statutes will always be construed as prospective in their operation, unless their language constrains a contrary construction.

Foreign insurance companies issuing policies from their own domicils, who do not carry on business here, who have no agent here, and who only agree to accept risks placed for them by a person residing here, can not be compelled to pay a license-tax to the city of New Orleans in virtue of an ordinance which imposes a license of $1000 on "every *agency* doing insurance business in said city, for any insurance company or companies not therein located, for each and every company by said agent represented." Foreign companies are amenable to said tax who do business here through an authorized agent.

This court can not alter, or modify its judgment, because an alleged agreement between the parties, suggested for the first time on an application for a rehearing, will, in consequence of the judgment, work injustice to one of the parties

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

S. P. Blanc, Assistant City Attorney, for plaintiff and appellee.

M. M. Cohen, *Hudson & Fearn*, *Breaux*, *Fenner & Hall*, and *Bayne & Renshaw* for defendants and appellants.

The opinion of the court on the original hearing and application for rehearing was delivered by SPENCER, J., and on the rehearing by MANNING, C. J.

SPENCER, J. This record contains a number of cases tried together, and depending substantially upon the solution of the same questions.

In December, 1878, as by law required, the City Council adopted ordinance No. 4789, and an amendatory ordinance, No. 4820, imposing a license tax on "each and every insurance company (life and accident insurance companies excepted) located and doing an insurance business in the city of New Orleans; *every agency doing such business in said city for any insurance company or companies* not therein *located, for each and every company by said agent represented, one thousand dollars.*

"Every life insurance company or agency, and every accident insurance company or agency, *five hundred dollars.*"

These ordinances went into effect on January 1, 1879, and were predicated upon and preceded by the *annual estimate* of expenses of 1879, required by law to be made. This estimate is by law made the basis of taxation for the ensuing year, and itself constitutes exclusively the appropriation bill of that year. In other words, the city is required in November or December of each year to state and publish in detail

the purposes and amounts of money to be expended for the ensuing year, and then to impose licenses and taxes to an amount which will exceed that estimate by ten per cent.

See Act No. 7, sec. 19, extra session of 1870; sec. 14 of Act No. 73 of 1872; sec. 2 of Act 68 of 1877.

By another law the licenses so levied and assessed by the city were due and payable during all the months of January and February, and only became exigible by suit and with penalty from and after the first March of each year.

On the ninth February, 1879, after a large number of insurance companies had paid the license so levied against them, the legislative act No. 27 of 1879 was passed and promulgated; the fifteenth paragraph of the first section of which enacts, "that there shall be collected from each agent or representative of an insurance company created by or under the laws of this State, and transacting an insurance business therein, one thousand dollars; from each insurance company or agency not chartered by this State, but transacting business therein, one thousand dollars; *provided*, that no parish or municipal corporations throughout the State shall assess any license tax of over five hundred dollars on any such insurance company." Acts 1879, No. 27, p. 42, sec. 1, § 15.

All the defendants in these suits claim the benefit of the *proviso* in said act, and contend that it repealed the ordinances of the city, imposing on them a greater license than $500 for the year 1879.

P. A. Barker and Messrs Welshans & Woods, who are "Insurance agents," each for several distinct foreign companies, claim, besides, that the ordinances of the city, in so far as they are construed as levying a license tax of $1000 for each of their several companies, are illegal and unconstitutional, and violative of the rules of uniformity and equality. That the business of "insurance agent" or solicitor is a known and recognized industry, and can not be subjected to this tenfold taxation.

The first question presented, therefore, for solution is whether the Act 27 of 1879, which contains the usual repealing clause, had the effect to repeal and annul the ordinances of the city imposing and assessing licenses to meet the estimated expenses of 1879. If it did not have that effect, it will be unnecessary for us to go into the question of legislative power to pass retroactive laws, and other kindred questions so extensively discussed before us.

It is a safe and long-established rule of interpretation that laws prescribe only for the future. C. C. Art. 8.

And it certainly was the intention of the framers of the constitution of 1868 to at least consecrate that rule, for it provides that "no retroactive" law shall be passed. Constitution, art. 110.

With these provisions staring us in the face, we certainly would not be justified in holding an act to have a retroactive effect unless its terms were so imperative and so explicit as to admit of no other construction, as seems to have been the case in Whited vs. Lewis, 25 A. p. 570.

Turning to the provisions of the act, we find that it is couched in terms prospective only. It says, "no parish or municipal corporation throughout the State *shall assess* any license tax over $500, etc;" that the act shall take effect "*from and after its passage*," to wit, ninth February, 1879. Here, then, are no words looking to *the past*. Its operation is by its very terms for *the future*. It does not say that no corporation or parish shall *collect* a greater license, but that it shall not hereafter assess, i. e. levy, or impose a greater.

We have seen that the ordinances of the city imposing, assessing, these licenses were passed nearly two months *before* this act was passed. When we turn from the language of the act to the circumstances surrounding the legislature, it is rendered almost certain that it was not the intention to give it the effect claimed by defendants. The city had made its estimates for 1879; had thereby made appropriations to meet the various debts and liabilities covered by its estimate; had, in fact, created liabilities and debts, all predicated upon and to be paid out of these licenses and taxes assessed and levied in December, 1878. On the faith of these prospective receipts it had employed laborers, police officers, etc. The law absolutely forbade that the expenses should exceed the revenues. Is it rational to suppose that under these circumstances the legislature intended to force the city administration into a violation of law, by cutting off its means and resources to meet its liabilities and thereby derange all its financial affairs?

We think it more than probable that the reason why the amendment referred to by counsel, as having been offered pending the passage of the bill, postponing its operation to December, 1879, was voted down, and another providing restitution to those who had already paid the license was dropped in the House, will be found in the view we have taken, to wit, that the act did not apply to municipal taxes already levied and assessed to meet debts and liabilities already in large part contracted.

Judge Cooley in his Work on Taxation p. 221, thus states the rule applicable to this subject: "But there is commonly a presumption that any new tax-law was not intended to reach back and take for its standard of apportionment a state of things that may no longer be in existence." Taxation, p. 221.

Further writing on the same subject, he pronounces that to be "the general rule of law which requires the courts to *always construe* statutes

as prospective and not retrospective, unless *constrained* to the contrary cause by the *vigor of the* phraseology."

In Oakland vs. Whipple, 44 Cal. 303, it was held: "Where taxes are levied under a law which is repealed by a subsequent act, unless it *appears clearly* that the legislature intended the repeal to work retrospectively, it will be assumed that it intended the taxes to be collected according to the laws in force *when they were levied.*" See, also, City of New Orleans vs. Day, 29 A. 416.

Holding, therefore, that the act did not affect the city licenses already imposed, we are spared the labor of discussing the questions of legislative power to do so.

P. A. Barker represents five foreign fire insurance companies and one life insurance company.

Welshans & Woods represents eight similar fire insurance companies and one life insurance company.

We have seen that there is by the terms of the ordinances imposed as license on "every *agency* doing insurance business in said city, for any insurance company or companies not therein located, for each and every company by said agent represented * * * one thousand dollars." In other words, it is on "*the agency*" that the license is imposed, and that license is to be at the rate of $1000 for each company whose policies are sold or delivered by such agency. The license is not levied on the companies. They enter into the question only as an element of calculation, to measure the license to be paid by the agency. Such a rule of imposition is clearly in violation of the rule of equality and uniformity. See New Orleans vs. Home Insurance Co., 23 A. 449; State vs. Endam, 23 A. 664; Feliciana vs. Gurth, 26 A. 640; Cullinene vs. New Orleans, 28 A. 102; Police Jury vs. Nougues, 11 A. 739.

But aside from this view of the case it is alleged and shown by Barker and Welshans & Woods, that, in fact, they carry on the business of "insurance agency; that they negotiate insurance upon commission, and to increase their incomes they procure authority from foreign companies to place risks for them, and that they solicit the patronage of persons desiring to insure; that they are under no obligation to solicit for any particular company, each company simply agreeing to accept such risks as they may place for them; that this business is conducted in their own interest and behalf, they renting and furnishing their own offices and defraying all expenses out of their own means; that the policies delivered are issued by the companies at the several places where they are domiciled, and that said companies have and keep no offices here.

Under this state of facts it is manifest that the business carried on by these parties is a distinct, separate, and individual industry or occu-

pation, and only taxable as such. There is no more reason for taxing them at the rate of $1000 for each company whose insurance they sell than there is for taxing that class of jobbers who make a business of selling the manufactures of foreign factories, at the rate of $1000 for each company whose goods they sell on commission. The principle is precisely the same. They are both agencies.

But the business of fire and marine insurance is a distinct one from that of life insurance; so the business of "life insurance agent" is distinct from that of "fire and marine agent."

Where the same person follows two occupations, recognized in commerce as separate, and taxed and classed distinctively by law, he must pay a license for each. See "City of New Orleans vs. Metropolitan Loan and Pledge Bank," lately decided and not yet reported.

On the question of interest, the ninth section of Art. No. 48 of 1871 and act 41 of 1874 provide in effect that "all taxes imposed by the city of New Orleans" shall bear ten per cent interest from first March of each year.

We regard the terms "all taxes imposed" as generic, and as covering license taxes levied for revenue.

No judgment can be given against those companies represented by P. A. Barker and Welshans & Woods. Nor can we render judgments against Barker and Welshans & Woods for licenses due by them as conducting agencies, since personally they are not sued. Barker is liable to the city for a license of $1000 for his fire insurance agency and of $500 for his life insurance agency; and Welshans & Woods for like amounts. We reserve the rights of the city to claim these licenses from said parties in proceedings to be brought against them personally

It is, therefore, ordered, adjudged, and decreed that the judgments appealed from be avoided and reversed, and plaintiff's demand rejected at its costs in the following cases: City of New Orleans vs.

No. 50,048, Continental Insurance Company.
No. 50,049, Hartford Fire Insurance Company.
No. 50,051, Home Fire Insurance Company.
No. 50,052, Ætna Insurance Company.
No. 50,053, Franklin Fire Insurance Company.
No. 50,110, Mass. Mutual Life Insurance Company.
No. 50,061, Mercantile Mutual Insurance Company.
No. 50,062, Queen Insurance Company.
No. 50, 063, German American Insurance Company.
No. 50,064, Royal Insurance Company.
No. 50,065 Manhattan Fire Insurance Company.
No. 50,060, Commercial Union Assurance Company.
No. 50,059, New York Underwriters' Agency.

No. 50,078, Fire Association of Philadelphia.

No. 50,109, Equitable Life Assurance Company.

It is further decreed that the judgments appealed from be affirmed at costs of appellants in the following cases;

No. 50,050, New Orleans vs. Rhenish Westfalian Lloyds.

No. 50,046, New Orleans vs. Imperial and Northwestern Fire Insurance Companies.

No. 50,072, New Orleans vs Western Assurance Company.

No. 50,058, New Orleans vs. Great Western Insurance Company.

ON APPLICATION FOR REHEARING.

SPENCER, J. The defendants in the above two cases, decided with others by us on 23d May, apply for a rehearing, on the ground that we should have rendered in those two cases the same judgment we rendered in the cases against the companies cited through P. A. Barker and Welshans & Woods.

To support their application it is said,

1. That the petitions of the city against them are identical with those against the Barker and Welshans & Woods companies.

2. That the prayer of the petition in all the cases is the same.

3. That the judgments of the court below are similar in all the cases.

This is all true; but the conclusion drawn by counsel that *ergo* the same judgment ought to have been rendered by this court in all the cases, is, we think, a *non sequitur* for the following reasons:

The answers of Barker and Welshans & Woods, and *their evidence* in support thereof, present issues not made by the two companies now complaining.

S. A. Moritz, through whom, as agent, the Westfalian Lloyds is cited, answers by "a general denial of all plaintiff's allegations, except such as may be admitted." He then "*admits that he is the agent of said company in New Orleans,*" and that as such he had tendered the city $500. The act of February 9, 1879, is then pleaded as repealing the city license ordinances.

Fell, through whom the Imperial & Northern is cited, makes in all respects a similar answer.

But the answer of Barker and Welshans & Woods is a very different one. Like the complainants, they plead the acts of ninth February, 1879. But they deny all of plaintiff's allegations. They specially plead and proved that they are carrying on a separate and independent industry and occupation, to wit, that of insurance agency; that they conduct it in their own interest and for their own benefit in their own offices, kept

and paid for by themselves; that the companies whose insurance they sell have no offices in this city, and no exclusive agents, and issue their policies from their home offices, under an agreement to accept such risks as respondents may place for them; that because they place risks for several companies is no reason why they should be taxed for each company, and that such taxation would be unconstitutional.

Under these special pleadings and proofs we rejected the city's demands as to the companies cited through Barker and Welshans & Woods, for the very good reasons that the companies were not carrying on an insurance business *in this city*, had no agents or offices here, and were not suable through Barker and Welshans & Woods, who disclaimed authority to represent them.

But no such special defense was made by Fell or Moritz. On the contrary, they admitted that they were the agents of their respective companies, and pleaded partial payment of plaintiff's demand.

Nothing in the record informed us that they were conducting such a business as Barker and Welshans & Woods. No plea or proof to that effect was before us. Nor is there now before us any such plea, *except in their briefs for a rehearing*, nor any proof except what is contained in an agreement of counsel *produced now for the first time*, after judgment, whereby it appears that Moritz and Fell each represent an additional company, sued on similar demands by the city, but in which no judgments have yet been signed by the court below, and which, therefore, can not possibly be before us.

It appears by said agreement that Fell and Moritz have agreed that the same judgment shall be entered in their said undecided cases as this court may render in the Westfalian Lloyds case. The counsel complain that the effect of our decree is to make Fell and Moritz each pay $2000 ($1000 for each of their companies) for carrying on the same business as Barker, who is only to pay $1000. That "no further animadversion" of our decree is necessary than thus to state its effect, to which we reply that this court decides cases as they are presented by the pleadings and evidence. That outside of the record we can know nothing, and that the court does not feel that its decrees deserve animadversion for failing to sustain defenses which parties have not made. We are asked in consequence of that agreement, *made in cases not before us*, and produced for the first time on application for rehearing, and not "*previous to submission*" as agreed, to annul and reverse our decree herein, not because it is wrong upon the pleadings and facts before us, but because through the operation of defendants' said agreement, they will be forced to pay a double license.

It is not for us to say what effect is to be given to that agreement; perhaps the court below may, under the circumstances, hold that it is

not binding; perhaps the city may not insist on it. Whatever its effects, this court does not feel any responsibility for them.

The rehearing is refused.

ON REHEARING AS TO COMPANIES REPRESENTED BY BARKER AND BY WELSHANS & WOODS.

MANNING, C. J. Two opinions may be reasonably supposed to have exhausted all that should be said in this case. The third shall be brief.

The city attorney, in his brief on rehearing, remarks that a discrimination has been made by the court, in that each of the several Companies represented by Fell, Smith, and Moritz is condemned to pay full license, while those represented by Barker and Welshans & Woods are treated quite differently, notwithstanding the latter hold precisely similar relations towards their agents as the former towards theirs. He seems to have forgotten or not to have known of our opinion on the application for a rehearing, in which the cause as well as the necessity for such discrimination was pointedly demonstrated to be the difference in the pleading of these several parties.

Our decision was that the city ordinance, by express terms and in unmistakeable language, imposed the license on the agency, and not on the Company or Companies that employed the agent, and therefore that each agency could be compelled to pay the license but once, and not as many times as it represented companies—that the business of Life Insurance agent is distinct from Fire and Marine Insurance agent, and each is therefore liable for a separate tax or license—that the judgments against the companies, which were affirmed, must stand, because their own pleadings admit the agency, plead a tender of part of the sum demanded, and plead a legislative Act as a remittitur of the residue—that the judgments against the other companies could not stand, because an agency as to them is specially denied, and it is alleged and proved that the parties, who were assumed to be their agents, carry on a separate, distinct, and independent business, which the city ordinance in effect recognises as a trade, profession, or occupation—and that these parties, not having been sued individually, could not be condemned individually.

Patiently going over the transcript and briefs once more, we think our former decree not only consistent but inevitable, unless counsel are willing to concede that this court can remodel pleadings, or that we can disregard the plain terms of an ordinance of the city to prevent a diminution of its revenue, to the prejudice of those who carried on business under the protection that ordinance was supposed to afford.

It is therefore ordered that our former decree remain undisturbed.

No. 7351.

MARY B. POWELL, WIFE OF H. S. BOSLEY, VS. D. H. HAYES, ET AL. MRS. M. R. MAY, WARRANTOR.

The answer of a third person in possession of mortgage property bought by him, admitting possession, and referring specially to his title, will cure the defect in the pleadings of the mortgage creditor, who holds a mortgage on one fourth of the property, arising from the latter's failure to describe or designate the portion of the property held by defendant.

The warrantor has a right to raise any legal defense against the plaintiff's demand, because his obligation is to protect the defendant against that demand.

Neither the conventional partition of certain land held in indivision by two owners, nor the subsequent sale of that portion of the land acquired in the partition by one of the part owners, (sold in his succession) can divest or impair any mortgagee of his undivided interest in the land executed by the other part owner, before the partition took place, when it does not appear that the mortgage creditor was a party to the partition.

Renunciations of rights are not to be presumed.

As against a special mortgage, the right of requiring a previous discussion of other property embraced by the mortgage, but subsequently sold, does not exist.

The creditor is bound to impute to the extinction of his credit all sums received by him from the debtor, or from the securities of the debt.

A creditor with a mortgage resting on the whole of a certain tract of land, who remits, or releases his mortgage on a portion of the land, thus enabling the debtor to sell that portion free from incumbrance, does not forfeit his right to proceed against, and subject to the payment of his whole debt, the remaining portion of the land, which had been sold to, and was held by a third possessor, because he had failed to subrogate such third possessor to his rights against the portion of land released from mortgage. The third possessor has no legal right to demand such subrogation.

APPEAL from the Seventeenth Judicial District Court, parish of Red River, *Pierson*, J.

L. B. Watkins for plaintiffs and appellees.

Chaplin, Cunningham & Chaplin, J. H. Pierson, J. H. & M. J. Cunningham, and *Armand Pitot* for defendants and warrantor, appellants.

The opinion of the court was delivered by

SPENCER, J. This is the hypothecary action. James R. and Peyton R. Bosley owned in common, or ordinary partnership, several tracts of land. Peyton R. died early in the year 1859, leaving as his sole heirs two sons, John R. and Hubbard S. Bosley. On 29th July, 1859, James R. and these two sons of Peyton R. entered into an agreement, whereby, for the purposes and as basis of future settlement and division, they declared what property was owned and held by them in common. There seems to have been a number of sales and transfers, after this, between these parties of various portions of these lands. On 24th December, 1859, John R. sold to Hubbard S. his interest in certain of these lands and by another act of sale Hubbard S. sold to John R. his one fourth interest in and to a certain described plantation containing 900 acres,

and another tract containing some fifty acres, for $12,600, of which $8000 was said to be paid satisfactorily as cash (evidently by the previous sale from John R. to. H. S., which was for $8000), and three notes of $1533 33, each falling due in one, two, and three years, for security of which a special mortgage and vendor's lien were retained. The last of these notes was transferred by H. S. Bosley to his wife in satisfaction of paraphernal claims, and upon it the present suit is brought.

Shortly after the sale aforesaid from H. S. to John R. Bosley, the latter and James R. Bosley partitioned by notarial agreement the plantation and other lands referred to, one fourth of which was subject to said mortgage in favor of H. S. Bosley. In this partition one half was set apart in kind to James R. Bosley and one half to John R. Bosley. Of the half falling to John R. Bosley, he *subsequently* sold off to various persons at different times portions thereof.

In several instances H. S. Bosley and his wife, by formal acts relinquished their mortgage and privileges on the portions so sold by John R. Bosley. In only one of these acts is the consideration of the relinquishment stated, to wit: that to one Upshaw, where it is stated that the relinquishment is made for the consideration of $600.

Mrs. H. S. Bosley having acquired the note of $1533 33, as aforesaid, brought suit against John R. Bosley, obtained judgment, and seized and sold the lands remaining in his hands, she being the purchaser at the price of $650. James R. Bosley having died, his lands were sold at succession sale and bought by Mrs. May, who sold 262 acres thereof to Hayes, who sold part thereof to Giles.

The present suit is brought by Mrs. H. S. Bosley to subject the property bought by Hayes to the mortgage and vendor's privilege securing said note. Hayes calls Mrs. May in warranty, and Giles calls Hayes in warranty.

She alleges that her husband, H. S. Bosley, had sold to John R. Bosley, with reservation of mortgage and privilege, one undivided fourth of the plantation, containing 900 acres, and other lands as per deed of date made part of the petition. She then avers "that portions of said mortgaged property are in the hands and occupancy of D. H. Hayes, who holds under title as owner, and that other portions are in the like possession of Allen Giles, and that she desires to enforce her said mortgage against said property in their hands, etc."

No description or designation whatever is given of the "*portions*" of these lands so held by these parties. But we think the answers of the defendants, wherein they admit possession and refer specially to their titles, cure these defective and insufficient allegations of plaintiff. That the defendants' objection to plaintiff's evidence for insuffi-

ciency and vagueness of allegation was therefore not well taken, and was properly overruled.

The answers of defendants and warrantor to plaintiff's demand set up in substance,

1. A general denial.

2. That plaintiff has no mortgage on the lands in question, because of the partition and the probate sale mentioned.

3. That *subsequently* to the partition with James R. Bosley, and the conveyance therein to him by John R. Bosley, said John R. Bosley made divers and various sales to other persons, and that the property thus subsequently transferred must be discussed before resorting to the lands previously transferred to James R. Bosley.

4. That plaintiff and her husband have debarred and estopped themselves from enforcing their mortgage against the property so sold to James R. Bosley, by reason of their having renounced their mortgage in favor of junior and subsequent purchasers of portions of the mortgaged property from John R. Bosley, thereby putting it out of plaintiff's power to subrogate defendants to said mortgage as against said subsequent purchasers.

5. The plaintiffs are bound to account for all sums received from the debtor or others on account of said mortgage.

We may remark here, by way of preface, that plaintiff's proposition that the warrantor's answer can raise issues only with defendant is clearly erroneous. The warrantor's duty and obligation is to defend the suit and protect the defendant against plaintiff's demands.

We have no hesitancy in reaching the conclusion that neither the act of partition between James R. and John R. Bosley (being simply a conventional one) nor the probate sale of James R. Bosley's estate had the effect of divesting the mortgage in favor of H. S. Bosley. Probate sales divest only the mortgages imposed by the deceased, not those affecting it when he acquired. See 6 N. S. 386; 5 L. 470; 9 L. 12; 29 A. 385.

Judicial partitions alone have the effect of divesting mortgages upon undivided interests in property, and attaching them to the mortgagor's lot. C. C. 1338; 6 La. 214.

But defendants' counsel argues with much ingenuity and plausibility that though not in name a party to this act of partition H. S. Bosley must be considered as in reality privy and consenting thereto. That the deed from John R. to H. S. of his interest in certain lands, that of H. S. to John R. of the lands in question, and that of partition between James R. and John R. must be viewed as so many steps in execution or consummation of what was contemplated by the act of 29 July, above referred to, to wit, partition of the property. We are unable

to concur in these views. We find nothing in the act of 29 July, or in any subsequent act, which expressly or impliedly binds H. S. Bosley to any future agreements which may be made between James R. and John R. Bosley to which he might not be party. To say that because he, by the act of 29 July, agreed upon what was the common property and that future settlements should be based upon the property so agreed upon, he thereby made himself a party consenting to future agreements between his co-proprietors, would be pushing the doctrine of implied consent to extremes. Renunciations are not to be presumed. We can infer no agreement on his part to renounce his mortgage on the property falling to James R. Bosley.

It is very clear that the right of requiring previous discussion of other property subject to the same mortgage, but subsequently sold, does not exist as against a special mortgage. C. P. 73 and 715.

It is equally certain under the Louisiana Code, as well as under every principle of equity, that the creditor must impute to the extinction of his credit all sums received by him, whether from the debtor himself or from the securities of the debt. See C. C. (old) 2202.

The real difficulty in this case is presented by us under the fourth head above mentioned.

A debtor grants a special mortgage, for instance, on his entire plantation. Subsequently he sells half of it to a third person, encumbered with the mortgage, and later sells the other half to another third person; can the creditor, after this first sale, release and remit his mortgage on the half subsequently sold, and then pursue the third possessor of the half first sold for the whole debt?

If this third possessor, upon paying the mortgage debt, would be legally subrogated to the debt and mortgage, as they stood at the date of his purchase, for the purpose of forcing the holders of other portions of the mortgaged property to contribute to the payment; or if we can consider the third holders or the property in their hands as sureties of the debtor, or as debtors *in solido*, then we must hold that the creditor can not pursue for the whole where he has renounced or remitted his mortgage upon part of the property.

We confess that equitable considerations have strongly inclined us to the adoption of these views; but a careful and closer consideration of the question constrains us to the opposite conclusion.

The principle which underlies the doctrine of legal subrogation, as to sureties and debtors *in solido*, is that there is privity between the creditor and the person paying; that they are parties to a contract, and that the creditor can not execute that contract in full against one of the parties, after releasing other parties to it, thus throwing the whole *onus* of it upon one party, who by the terms and effect of the contract had

the right of sharing its burdens with others. Upon this principle the law declares that the release given by the creditor to one debtor *in solido* will discharge the others for his part. C. C. That the extension of time to the principal, or the release of securities, will entitle a surety to discharge or *pro rata* relief. C. C.

In other words, the creditor is bound to preserve all his rights for the benefit of that one of his debtors who pays, against all his co-contractants. The contract must be preserved as a unit if it is to be enforced in its integrity.

Now the third possessor of the mortgaged property is not privy to the contract between the creditor and the original mortgagor. He is not bound for the debt. The creditor has never *consented* to take him as surety. *Without the consent of the creditor* no one can become surety of the debtor in a conventional obligation. He may do so without the consent of the debtor, but not without that of the creditor, for suretyship, like other contracts, requires the concurrence of *two wills.*

There being, therefore, no privity between the mortgage creditor and the third possessor, the former is under no obligation to preserve his privileges and mortgages against others, in order that the third possessor may have subrogation thereto in their entirety. It may be that the third possessor, having an interest in discharging the debt, will, upon payment thereof, be entitled to subrogation *to the then existing rights* of the mortgage creditor. " But " as is said in Offut vs. Hendsley, 9 L. 13, " between these two there is no privity of contract; they are mere volunteers; he becomes * * * a vendee of the mortgagor without the knowledge or assent of the creditor, and may have done so against his will. He is under no obligation to pay the creditor, and when he does pay, he must be satisfied with a subrogation *to these rights as they exist.* * * * We can not see how the rights of a mortgagee may be affected or put *in duriori casu* by the circumstance of there being a second mortgagor or a sale of the mortgaged premises, etc."

If, therefore, the mortgage creditor was under no obligation to preserve his securities against others for the benefit of the third possessor, the latter can not complain if the creditor has renounced or lost them. These views have been expressed by this Court (in " Launusse vs. Larma," 6 N. S. 104, even in regard to the case of *the legal* mortgage of the wife, who sought to enforce her mortgage against a prior purchaser, who pleaded the benefit of discussion, and that she had renounced her mortgage on properties *sold subsequently* to that held by him. If that be good law (upon which we express no opinion) in cases where the law gives and requires discussion of property subsequently alienated, it is so for a stronger reason in cases of special mortgage where the right of

discussion does not exist. It was also held in Jackson vs. Williams, 12 M. 334, that when property subject to a judicial mortgage was sold by one act, in lots, to different purchasers, one of these purchasers, on being pursued, could not claim the benefit of division.

In Bayley vs. Tate, 10 R. 45, it was held that "the plea of discussion can not be opposed to a creditor holding a special mortgage, C. P. 73; C. C. 3367. Nor can a third possessor of property specially mortgaged for a debt, for which other property is also bound, require that it shall be held liable only for a *pro rata* portion of the debt. Each and every part of property mortgaged is liable for each and every portion of the debt." See, also, Suffet vs. Foullu, Journal du Palais, 1872, p. 1210, and authorities there cited in Note 2.

Under the operation of these principles, we conclude that the renunciations made by the plaintiffs of their special mortgage in favor of subsequent purchasers of portions of the mortgaged premises do not estop or prevent them from enforcing it for the whole, against the portions of the property in the hands of defendants, who were purchasers prior in date to those in whose favor the renunciations were made.

We think the judgment appealed from is correct, and it is affirmed with costs.

Rehearing refused.

No. 7569.

STATE EX REL. A. J. PADRON VS. PARISH JUDGE OF ST. BERNARD.

This court will not issue a mandamus to compel the judge of a lower court to grant an injunction, or a sequestration, in a case not before this court on appeal.

APPLICATION for a writ of mandamus.

Henry Chiapella for relator.

Respondent not represented.

The opinion of the court was delivered by

SPENCER, J. Relator alleges that the respondent has arbitrarily refused to grant him an order of sequestration, although he has in every respect complied with the requirements of law for its obtention.

He annexes his petition for injunction, and asks this court to compel, by mandamus, the parish judge (acting in the absence of the district judge) to grant the order, etc.

Articles 820 and 831, C. P., are sufficiently broad to justify relator in this request. But this court must measure its powers by the constitution, which declares that its jurisdiction is appellate only, except in certain cases, of which this is not one. Constitution, arts. 74 and 77.

It is settled jurisprudence that this court can issue the writ of mandamus only when asked in aid of its appellate jurisdiction. The case before us is not within the operation of that rule.

If we may compel the judge to grant an injunction, we may compel him to grant any other order which he ought to grant, such as a continuance, attachment, etc. It is manifest that we can only reach such matters when brought before us on appeal. In March last we decided the point now before us adversely to relator. See State ex rel. Poole vs. Judge Second District Court (not reported).

It is therefore ordered that the mandamus be refused at the costs of relator.

No. 7245.

AMADIE TESTART VS. HYPOLITE BELOT ET AL.

The petition of appellant, verified by his oath in a suit to enjoin a sale, that the property sold, and which he claims is worth over $600, gives this court jurisdiction, although it may appear that he bought the property for $400, subject to taxes, and that the judgment under which the sale was made was for only $200.

The creditor of one who has made a simulated sale of his property has a right to prove the simulation by parol evidence. He is not restricted to a *counter letter*, as a means of proof.

The innocent holder of a mortgage note, executed by one in whom the recorded legal title of the mortgaged property rested, can not be affected by the fact the recorded title rested on a simulated sale.

Where it is alleged that the holder of a note is not its owner, that it was passed to him for the purpose of suing on the same, thus alleging in effect that he is a party interposed to defeat the plaintiff's claim, evidence is admissible to prove the non-ownership.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

W. E. Murphy for plaintiff and appellant.

A. B. Phillips for defendant and appellee.

ON MOTION TO DISMISS.

SPENCER, J. Defendants, appellees, move to dismiss this appeal, on the ground that the amount in dispute does not exceed $500.

Plaintiff, the appellant, enjoins the sale of a certain lot of ground in New Orleans, seized at the suit of Belot vs. Meir. The injunction is based upon plaintiff's claim of ownership of the lot, which is the thing in dispute. The petition, verified by oath, alleges the value of the lot to be over $600. It seems that plaintiff acquired the lot at public sale for $400, subject to taxes, and that the judgment under which this sale was made was for only $200. Appellee contends that these facts show a value less than $500.

We think this conclusion a *non sequitur*. These facts are not inconsistent with the allegation and oath of plaintiff, that at date of injunction the property was worth six hundred dollars.

The motion is refused.

ON THE MERITS.

The opinion of the court was delivered by

MANNING, C. J. The brief of neither counsel places before us the order and date of events, which facilitate the decision of this case, in that regular sequence which at a glance gives a comprehension of the question at issue. The property was acquired, alienated, and mortgaged thus;—

Fortwendel acquired it in 1848,
and sold it to Courcelle in 1865,
and Courcelle sold to Marie Meir in 1867,
and Marie mortgaged it to Clay in 1872,
and Belot bought it in May 1878

under that mortgage, and at its foreclosure, having become the owner of the mortgage note, and himself being the actor in the executory process which forced the sale, and the purchaser at the sale.

Fortwendel mortgaged it to Testart in 1876,
and Testart bought it in March 1878

under that mortgage, and at its foreclosure.

Testart, the plaintiff, thus acquired it under a mortgage from Fortwendel, given in 1876, eleven years after he had sold it to Courcelle, and Belot, the defendant, acquired it by a chain of title from Courcelle. *Prima facie*, that statement would settle the dispute.

This action was instituted, pending the executory process of Belot, to arrest that sale, and to have Fortwendel's sale to Courcelle, and the latter's to Marie Meir, declared simulations and of no effect, the plaintiff averring that Marie Meir was Fortwendell's wife, who could neither acquire nor mortgage without his authorization, and besides, that the mortgage was obtained from her by Clay through fraudulent misrepresentations.

The marriage, if ever there were any, was not only carefully concealed, but Fortwendell had ostentatiously described himself as unmarried in the sale to Courcelle, and the latter, two years after, in his sale to Marie, with imitative particularity, uses the prefix to her name which belongs to her as a spinster. It was not until January 1878, when Belot was about to foreclose the mortgage given to Clay, of which he had become owner by the acquisition of the note which it secured, that Fortwendell and Marie appear in legal proceedings as man and wife.

They sued out together an injunction, alleging that they were married before Courcelle's sale to her, and the property was therefore community, and the wife's mortgage without authorization was nothing worth, and the note which it secured was valueless.

But it was proved on the trial of that case that Clay was the executor of Courcelle, and found the note among his effects, and called on both Fortwendell and Marie Meir for payment, for it seems there were some sort of relations between them. Clay as a broker enabled the lady to borrow money to take up that note, and she gave a new one with mortgage, and it was this last note that Belot acquired. But before this was done, Fortwendell himself paid the interest for successive years on this note, never hinting that the note was valueless because it had not his signature authorizing his wife (then unclaimed) to sign, nor intimating that the connection between himself and the signatory of the note was other than voluntary, and unsanctioned by the laws of the Church or State. On the contrary he always spoke to Belot (and the native tongue of both is French) of Marie as *la femme.*

The result of that trial was that our learned brother, who heard the case, measuring the turpitude of these people by that standard which morals and law alike prescribe, would not listen to them, while alleging that a marriage invalidated acts which they had done to obtain money, pretending and asserting all the while that they were unmarried; and turned them out of court without delay.

The present plaintiff also seeks to annull the sale from Fortwendell to Courcelle, and all subsequent transfers and mortgages of Courcelle's vendee, on the ground of simulation. He avers that the real title was in Fortwendell when the latter gave him the mortgage he is seeking to enforce, and all the Acts which put the apparent title in others are simulations, and void as against him. While therefore it is true that Fortwendell cannot be heard, while setting up the simulation of his conveyance to Courcelle, and cannot be permitted to assail the verity of that conveyance by parol testimony, but only by a counter letter—his creditor is not hampered by the same restriction. A party who has made a simulated sale of property has his own negligence to blame if he omits to take a counter letter, and therefore where land was alleged to have been conveyed for the purpose of giving the vendee an apparent title to enable him to recover in a petitory action, and no price was really paid, it was held the stipulation as to the nature and purpose of the conveyance could not be shewn by the party who made the sale except by a counter letter. Delahoussaye v. Davis, 19 La. 409.

Not so with the creditor of such party. Nouvet v. Vitry, 15 Annual, 653. If Testart can shew that all these transactions are simulations, he is at liberty to do so, and by parol testimony. Obviously that is the

only kind of testimony he could obtain, or would be likely to have at hand, to make such proof, and to hold that a creditor is barred from making such proof, and can only avail himself of a counter letter, which his debtor might purposely have omitted to take, would be to put in his way an obstruction to the enforcement of his rights, which the debtor may have designedly supplied.

But to enable the plaintiff to do this against Belot, he must have alleged the latter's want of good faith, and the absence of innocence and reality in the debt which he is urging, for it must be observed that even if the whole of the conveyances and mortgages under which Belot holds were simulations, he will not be affected by that fact if he is himself the innocent acquirer and holder of the note and mortgage of Marie Meir. In that case, if Testart and Belot have both been deceived, the former must suffer, since the latter in good faith had really acquired a note, secured by a mortgage, executed by one who by the public records appeared to be owner of the property.

The allegation is that Belot does not hold the note as his own—that "it was passed to him for the purpose of suing on the same." In effect, this is an allegation that Belot is a person interposed to defeat the plaintiff's claim, and has no real interest in, or ownership of the note and mortgage he has enforced. Proof should have been admitted on both sides to substantiate and to disprove this allegation. If Belot can disprove it, the mortgage he acquired will be good for his purposes, and Testart will be remediless, so far as concerns the mortgage property.

The lower court refused to admit parol testimony, offered by the plaintiff, to shew the simulation of the whole series of Acts, by which an apparent title was vested in Marie Meir, and to shew Belot's non-ownership of the note sued on by him, and his knowledge of and complicity with Fortwendell and Mary Meir in their fraudulent transactions. The testimony should have been admitted. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and the cause is remanded for a new trial under the instructions contained herein, the appellee paying the costs of appeal.

DISSENTING OPINION.

SPENCER, J. I understand that this cause is remanded to enable plaintiff to prove *by parol evidence* that a sale made by his debtor, and duly recorded *eleven years before* plaintiff's right *had an existence* was a simulation, and that other and subsequent transfers of said property, all prior to the origin of plaintiff's right, were also simulations.

In my opinion, the acts of a debtor *done prior to the origin* of a creditor's right are as much an estoppel of the creditor as they are of

the debtor himself. The *general rule* undoubtedly is that one can confer no greater right than he himself has. To this rule there are a few exceptions, such as those in favor of *bona fide* third holders of mercantile paper, and purchasers without notice of unrecorded incumbrances But exceptions can not be extended by implication or construction. They are *stricti juris*. All the analogies of our law are opposed to the conclusions of the majority of the court. Thus our Code expressly declares that a fraudulent act done by the debtor before the creditor's right accrued can not be questioned by the latter. That judgments rendered against the debtor before the creditor's debt existed are *res judicata* against the latter. And why? Because in such cases the debtor is the author and representative of his subsequent creditors, and they are as much bound and estopped thereby as he is. A deed, or act, or decree, which estops him estops them. Now it is elementary that the vendor and his assigns or heirs can prove simulation only by a counter letter. The rights of creditors, posterior in date to the act in question, are and can be no greater than his.

Any other doctrine is destructive of all certainty in public records and property titles, putting them at the mercy of perjured witnesses and bad memories. The exceptions to these rules, so essential to the public welfare, should not be multiplied by extending their principles to cases not clearly within their terms.

I therefore dissent.

Rehearing refused.

No. 7650.

THE STATE EX REL. WUNG CHUNG VS. CIVIL SHERIFF OF ORLEANS PARISH.

A debtor who has been legally arrested and imprisoned for debt, under a writ issued in a civil suit, can not, by confessing judgment, acquire the right to be discharged from arrest.

APPLICATION for a Habeas Corpus.

Thos. M. Gill, and *H. H. Bryan* for petitioner.

McGloin & Nixon for respondent.

The opinion of the court was delivered by

MANNING, C. J. The relator was arrested for debt, under a writ issued in a civil suit of Smith Bros. & Co. against him, and was imprisoned. His motion to quash the writ was refused. Thereupon he confessed judgment for the sum demanded, and then prayed an order of release, which being refused, he applied to us for a writ of *habeas corpus*.

The sheriff, answering the rule to shew cause, produced the body of the relator and the writ under which he is held. The sole ground, upon

which the discharge of the relator is demanded, is that the confession of judgment put an end to the creditors' right to the detention of their debtor.

The contrary has been expressly adjudicated in Anderson v. Brinkley, 1 Annual, 126, when the law, touching the right of a creditor to resort to the writ of arrest, was the same as it is now.

The act of 1840 abolished the writ of *capias ad satisfaciendum*, but the Code of Practice still retains the authorization for the writ of arrest, arts. 210 *et seq.*, and the latest revisal of the Statutes embodies provisions for the debtor's discharge under certain circumstances. Rev. Stats. 1870 secs. 85 *et seq.* In neither is it provided expressly or by implication that a judgment terminated the operation of the writ, and insures the debtor's discharge from imprisonment. The longest time he can remain in custody is fixed by the Statute at three months, and he cannot curtail that time by confessing judgment, and by that means alone set aside the writ.

This court, in the case already cited, remarked the difference of the writ of *ca. sa.* and of arrest, and observed that a proceeding, which was a writ of arrest before judgment, did not become a writ of *ca. sa.* by the rendition of a judgment. If it were otherwise, the debtor could by his own act metamorphose the legal process of his creditor, and convert it, at his own option, from one that the law sanctions into another that the law has abolished. The process, under which the relator was imprisoned, was in its inception a writ of arrest, which can be set aside and vacated only in the manner, and under the circumstances, by law provided. Confessing a judgment is not one of the ways thus provided.

It is ordered that the rule is discharged at the costs of the relator and he is remanded to the custody of the respondent.

No. 7584.

STATE EX REL. L. E. & E. F. HERWIG VS. JUDGE OF THE THIRD DISTRICT COURT.

Where on the application of a debtor for a respite, the question in dispute is whether or not the respite has been refused, the appointment of a provisional syndic before the decision of that question is premature; and the debtor is entitled to a mandamus, to compel the lower judge to grant a suspensive appeal from the order of the court making such appointment.

APPLICATION for a mandamus.

Charles Louque for relators.

McGloin & Nixon and *A. J. Lewis* for respondent.

The opinion of the court was delivered by

MANNING, C. J. Upon an application for a respite, made by the re-

lators, a meeting of their creditors was called, and was held before a notary public. The *procés verbal* was filed in court by the debtors who prayed the homologation of the deliberations. Several creditors, who had voted to refuse the respite, petitioned the court to appoint a provisional syndic, averring that the respite had been refused, because a majority in numbers and amount of the creditors had not voted for it. The debtors on the other hand maintained that a majority had voted for the respite, and a provisional syndic was appointed pending the contestation over this matter. A suspensive appeal was prayed from the order making this appointment, which was refused. Hence the present application for a mandamus.

The judge, responding to the rule *nisi*, says that he felt bound to be governed by what appeared from the face of the papers to be the result of the meeting of the creditors, and whilst irregularities are disclosed in the *procés verbal*, the conclusion he arrived at was the respite had been refused, and a cession of property ensued by operation of law, and consequently the matter had to be treated as if such cession had ensued, until it was otherwise determined.

It is true that when the creditors refuse a respite the cession of property ensues, and the proceedings continue as if the cession had been offered in the first instance. Civil Code art. 3065 new no. 3098. Arcenaux v. Creditors, 3 La. 37. But the point in dispute was whether or no the respite had been refused—the debtors maintaining that it had been granted, and offering the *procés verbal* in proof thereof, and praying its homologation. To appoint a syndic while that matter was undetermined was to assume that it was determined, because such appointment could only be made when there was a cession, and a cession ensued by operation of law only when the respite had been refused. And that it was not determined is apparent from the language of the respondent who treats the cession as having ensued "until it was otherwise determined."

Irreparable injury might be done by an order, based upon an assumption that a certain act had been done which may hereafter turn out not to have been done, and a suspensive appeal will alone give the complaining parties adequate redress, while the creditors are protected by the appeal bond. While the contestation exists touching the fact of respite granted or refused, a syndic, whose appointment follows only upon a refusal, cannot be appointed.

The mandamus is made peremptory at the respondent's costs.

No. 7565.

STATE EX REL. MARY L. AND ANNETTE MOORE VS. PARISH JUDGE OF ST. LANDRY.

Where a respondent makes answer to an application for a mandamus, he thereby waives his right of subsequently excepting to the proceeding on the ground that the allegations of the relator were not sworn to.

Persons in interest in a certain proceeding, notified of an application to compel a judge to grant an appeal in the case, can not rely on any exception to the regularity of the proceeding on the part of the relator, filed by the judge alone.

An *ex parte* order of court, granted on the application of an executrix, commanding the sale of succession property in order to effect a partition between the executrix, who has an undivided interest in the property, and the heirs, will be set aside, and the sale of the property enjoined on the petition of the heirs who, in consequence of the *ex parte* order, and the sale to be made under it, would be deprived either of their legal right to ask for a partition in kind, or, otherwise of retaining until a final settlement the price of any of the property they might purchase, at a sale of it made exclusively to effect a partition.

APPLICATION for a mandamus.

Lewis & Brother for relator.

Henry L. Garland and *Jno. N. Ogden* for respondents.

The opinion of the court was delivered by

DEBLANC, J. The relators are, by representation of their mother, heirs in part of the late Pierre Wartelle, who died in 1865, leaving, besides other property, some lots of ground situated in the city of New Orleans and appraised, with the improvements thereon, at forty thousand dollars.

Pierre Wartelle left a will in and by which he gave to his wife—Mrs Louisa King—one third of his estate and appointed her his testamentary executrix. In that capacity she applied for and obtained from the parish court of St. Landry an order commanding the sale of the city property, for the alleged purpose of partitioning the same and of paying unliquidated claims.

The intended sale of said property was enjoined by the relators, on the grounds:

1. That Mrs. Louisa King, acting as the executrix of her husband's will, has already caused to be sold, partly for cash and partly on credit, a portion of the estate of said deceased, the price of which she has retained as one of the purchasers, and the balance of which she has received as executrix; and that—as yet—she has rendered no account of her administration.

2. That the orders commanding the enjoined sale were rendered at chambers, without citation to them, and that they were thus excluded from any participation in the fixing of the terms and conditions of the common property.

The relators' injunction was dissolved on bond, and the condition of that bond, the amount of which is only five hundred dollars, is "*to secure Mary L. and Annette Moore for any and all claims which they may have, and for all damages which they may suffer by the sale of the property,*" which—as said—is appraised at forty thousand dollars.

From the *ex parte* order dissolving their injunction, the parish judge refused to grant them a suspensive appeal, and they have applied to this Court to compel said judge to allow their rejected demand, and to prohibit, until further order, the intended sale of the common property.

In answer to their application, the parish judge alleges, in substance, that he dissolved the relators' injunction, because, in his opinion, no irreparable injury could result from said dissolution; and that—under these circumstances—he could not consistently have granted an appeal from the order thus issued by him, and which he considers as fully authorized by article 307 of the Code of Practice. The judge's answer was filed on the *10th of September* 1879; and—here—he, the executrix and the sheriff, who is merely directed to make the sale already referred to, have—on *the 1st of November*—excepted to the proceedings in mandamus and prohibition, on the ground that the facts therein alleged are not sworn to by the relators themselves, but by their attorney.

As regards the judge, who—in this proceeding—is the principal party, the filing of his answer preceded, by several days, that of his exception, and—by his answer—he waived the irregularity which he now complains of. As to those who are otherwise interested in this matter, they have been duly notified of the action taken *against the judge*, for his refusal to grant the appeal, and they cannot—so far at least as concerns the mandamus—rely on an exception which he alone might have successfully urged.

Mrs. Wartelle—it is charged—has, since fourteen years, been appointed as the executrix of the last will of her husband, has sold property belonging to the estate of the deceased, purchased a part of the same, retained the price of what she purchased, received from others the proceeds of previous sales, and could not, without having rendered an account of her administration and of the funds already realized, force the sale of the property situated in this city, for the purpose, as she alleges, of paying claims which may not be due, the very existence of which is denied by relators, and for the additional purpose of executing the will of the deceased and effecting a partition of his estate.

One of the debts which the executrix thus attempts to satisfy, is her own claim for over twenty-four thousand dollars, and it is evident that—if unrestrained—the course which she was pursuing would inevitably have deprived the relators of two legitimate advantages—that of asking a partition in kind, or—otherwise—of retaining, until a final set-

tlement, the price of any of the property held in common and which they may purchase, at a sale made for exclusively a partition of their grandfather's estate.

C. C. 1337 (1260): 1343 (1265).

If the facts alleged and relied upon by the relators, and not denied by the judge, be hereafter substantiated by additional evidence, they certainly justify the injunction which they resorted to, and its dissolution on bond, which—if maintained—would be followed by a sale, a transfer of title and change of possession, might, and—it seems—could not fail to work irreparable injury.

C. P. 566; 23 A. 151; 11 A. 39; 14 A. 27; 39 A. 297.

The relators are entitled to the appeal which they have vainly sought to obtain.

It is, therefore, ordered that the provisional writs of mandamus and prohibition issued on the 11th October, 1879, be and they are hereby made peremptory at the costs of defendants.

No. 7518.

THE STATE VS. FRANÇOIS DUFOUR.

This court will not review or pass on the ruling of the lower court in a criminal case, either in receiving or in rejecting testimony, except where the objections and ruling are set forth in a formal bill of exceptions.

Proof that one accused of murder escaped and fled from justice, after arrest for the crime charged, is admissible.

The voluntary declaration of one charged with murder, received by the committing magistrate, is not admissible in evidence in his favor on the trial.

APPEAL from the Superior Criminal Court. *Whitaker*, J.

H. N. Ogden, Attorney General, for the State.

J. J. E. Planchard for defendant and appellant.

The opinion of the court was delivered by

MARR, J. The accused has appealed from a judgment sentencing him to imprisonment, at hard labor, in the penitentiary, for ten years, for shooting one Charles Secious, with a dangerous weapon, with intent to commit murder. He relies upon the objections taken on the trial to the rulings of the District Court, two of which are set forth in bills of exception. The other is not brought to our notice otherwise than as stated in the following extract from the minutes, copied into the transcript:

"Frederick Secious being cross-examined, the District Attorney, on the part of the State, objected to a question put by counsel for defend-

ant, which objection was sustained by the court under the following ruling: 'A collision between two mules on the street does not justify the shooting of the driver.' To which ruling of the court counsel for defendant reserved a bill of exceptions. The court continued its ruling as follows: 'I do not think it necessary in a charge of shooting with a dangerous weapon, with intent to commit murder, to show how mule teams collided. They may have collided by design, or they may have collided by accident. In either case the testimony is immaterial and irrelevant.' "

This is all that appears in the transcript in reference to this testimony; and if all that is thus stated had been set forth in a formal bill of exceptions, it is probable that we should have affirmed the ruling of the District Court, more especially since there is nothing in the transcript to show that accused was the owner or the driver, or that he was connected with or interested in either of the teams, or that any right or property of his was injured or impaired by the collision, or that the collision occurred by the fault of the person shot. In the case of the State vs. Jessie, 30 A. 1171, we decided that the act of 1877, p. 176, amending art. 488 of the Code of Practice, so as to dispense with formal bills of exception where the points reserved are taken down by the reporter or the clerk, is not applicable to criminal prosecutions. We can not review or pass upon the ruling of the District Court in criminal cases, whether in receiving or in rejecting testimony, except where the objections and ruling are set forth in a formal bill of exceptions.

It appears by the first bill of exceptions that counsel for the accused objected to testimony offered by the District Attorney, and received by the court, to prove that the accused fled, and was a fugitive from justice when he was first seen by the witness, a sergeant of the police, about a month after the alleged shooting. The statement by the court, before signing the bill is, that "evidence that the defendant had fled from justice after arrest for the crime charged, is admissible."

In the case of the State vs. Beatty, 30 A. 1267, we decided that proof was admissible that a person charged with the crime of murder attempted to escape from prison a few days before the trial. Proof that the accused actually escaped, and fled from justice, after arrest for the crime charged, is equally admissible. The effect of such testimony will depend on the surrounding circumstances; and it must be determined by the jury.

The second bill of exceptions is to the refusal of the court to permit the voluntary declaration of the accused to be read to the jury. In the State vs. Vandegraff, 23 A. 96, our predecessors decided that the law, R. S. secs. 1010, 2058, which makes the voluntary declaration of the accused, received by the committing magistrate, evidence before the

grand and petit jury, does not make it evidence in his favor, or authorize him to introduce it on the trial. In the State vs. Toby, decided in March last, No. 7100 of the docket, a majority of this court, after full discussion and careful consideration, held this to be the correct interpretation of the legislative will. The question must be regarded as settled by these decisions; and we accept them as final.

The judgment appealed from is, therefore, affirmed with costs.

Mr. Justice DeBlanc adheres to the views expressed in his dissenting opinion in the case of the State vs. Toby.

No. 7320.

STATE EX REL. P. N. CANTON VS. BOARD OF ASSESSORS.

The assessment of certain real estate made in the year 1877 for four years under the statute of that year, and not complained of then, can not be changed thereafter during the four years, except to make proper subtraction for destruction, or proper addition for improvements to the property, made after the assessment.

APPEAL from the Fifth District Court, Parish of Orleans. *Rogers*, J.

Chas. E Schmidt and *Julien Seghers* for plaintiff and appellant.

Samuel P. Blanc for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. Several pieces of real estate in New Orleans, belonging to Joseph Girod in 1877, were assessed in that year at $23,500.00. No reduction of that assessment was applied for. In June 1878, Canton, the relator, foreclosed a mortgage he held on the property, and purchased it at the sale for $10,700.00. In the following month he applied to the board of assessors for a reduction of the assessments so as to conform to the value as shewn by the price of adjudication. The Board refused, whereupon he demanded that it should appoint an appraiser, to act with another to be appointed by himself, who together should fix the cash value of the property. This was also refused, and this application for a mandamus has for its purpose to compel the board of assessors to do what he had demanded. The judgment of the lower court sustained the respondent in its refusal.

The question presented is, whether an assessment of real estate, made in 1877 for four years under the statute of that year, not complained of then, can be changed thereafter during the four years, except to make proper subtraction for destruction, or proper addition for improvements, made after the assessment.

This statute enacts that property shall be assessed once in every four years, but there shall be an annual assessment of personal property, and a revision of the assessment rolls for the purpose of indicating thereon all changes in the ownership of real property, and of deducting therefrom the value of all property lost or destroyed, as well as to add all increased value resulting from new improvements; and the assessor, in making his revision, shall take note of changes in value produced by the opening or closing of crevasses, or by any fortuitous event which has occurred since the time the first assessment was made. Sess. Acts 1877, p. 137. The rolls thus made shall serve as a basis for all State and city taxation for the year for which they were made and for three years thereafter, except that annually the assessor shall re-assess movable property, and shall make proper deductions for the destruction of any property and proper additions for improvements. Ibid. p. 155.

Another act was passed in the following year, amendatory of the previous one, (Sess. Acts 1878, p. 234) and the relator bases his right to relief upon the provisions of the two construed together, as well as upon the fact that he was not the owner of the property in 1877, and could not therefore apply for a reduction of the assessment made in that year at the time of the exposure of the rolls. He argues that when the Act of 1878, which took effect at once, "declared in its 1st. section that all real estate should be estimated by the Assessor at its cash value, and provided a new mode of obtaining the correction of assessments, and granted the officer acting for the State the right of appeal to the Courts, that Act meant that the Assessors should proceed in 1878 to make new assessments of real estate conformably to its provisions, and should allow the tax-payers and the State relief against over or under valuations in conformity with its provisions. Hence, sec. 90 of the Act of 1877 is to be construed so as to harmonize with sec. 1st. of the Act of 1878."

The 1st. section of the Act of 1878 is an exact transcript of the 15th. section of the Act of 1877, except that the provision touching personal property and capital is contained in a separate and intercalated sentence. The several provisions for the estimation of real property at its cash value, for a new mode of obtaining the correction of assessments, and for an appeal to the courts, are common to both Acts. The act of 1878 did not originate them. The first sixteen sections of that act are occupied solely with amendments of the law of the previous year, reciting the several sections to be amended numerically, and the 17th. sec., upon which the relator lays great stress, which gives to the assessor the right of appeal to the courts only accords to the one party the right that had already been granted to the other.

The relator further argues that the 19th. section of the act of 1878

must mean that the assessors were to proceed to make such changes on the roll of 1877 as he has demanded, and such as the tax-payers might shew themselves entitled to, or its language is unmeaning.

This construction comes of the fault of reading that section by itself, and of interpreting it to suit the necessities of his case.

The first seventeen sections of the Act have already been adverted to. The 18th. section assumes that there are persons and corporations, whose property has not been assessed for years by either city or State, "because of some irregularity, informality, or omission of the assessors," and then provides that the City Council shall require the board of assessors to proceed to assess or re-assess such omitted property. On the completion of this assessment of hitherto unassessed property, notice is to be given to the party liable who shall have thirty days to examine and obtain its correction "in the manner now provided by law by application and arbitration upon these assessments." Then follows the 19th. section, that the assessors shall immediately after the passage of this Act make such revision and correction of the assessment made in 1877 as may be necessary, and shall transmit this corrected assessment to the proper officers—manifestly referring solely to the assessment of hitherto unassessed property, and to the corrections necessitated by destructions or improvements.

The two Acts harmonize. Construing them together, it is apparent a new assessment of real property was not contemplated for 1878, but that all property hitherto omitted from the rolls should be placed thereon at once, and the same opportunity should be given for correction of its assessment as had been given in the original formation of the rolls, and that deductions for destroyed property and additions for improvements should be made every year.

The time within which assessments may be renewed is wholly within legislative discretion. The practice of making annual assessments of real estate has prevailed so long in this State that many, unaccustomed to any other system, think it a grievance to change it. But in truth such a system is very unusual. Ten years was the duration of such assessments in the old States, and still is in some of them. Unquestionably hardships are produced by a term even of four years. The changes in value may be very great in that time, but that consideration can be addressed only to the discretion of the legislature. Cooley Const. Lim. 513.

It is impossible to make a system of assessment and taxation that shall be practically wholly just. The selection of a particular day in any year as the time for fixing value, or for final closing of the rolls, will often produce injustice. Values may change in less than a year, but necessity requires that a day should be fixed unalterably. The machinery,

by which assessments of property for taxation are made, is a cumbrous and many-jointed suit of armour for the protection of the revenue of the body politic. All that legislation can do is to increase its flexibility so that attrition will be diminished as much as possible.

In answer to the *prima facie* case of the relator for a reduction, as exhibited by the sum for which the property sold, the respondent asserts that the relator loaned $15,000.00 on this property the year before he bought it, and hence the price given by the mortgage creditor at such a sale is not a fair criterion of value. We do not consider the question of value at all. We have dealt alone with the right of a property owner to a reduction of his assessment, before the expiration of the four years for which the assessment was made, in the absence of any destruction of the property or any portion of it. We think the two Acts under review were made expressly to deny such right.

Judgment affirmed.

No. 7214.

LOUIS DESOBRY VS. HENRY TÊTE.

Where a sum of money is received by a factor and commission merchant, under a written stipulation of the factor that he received the money to be invested by him for the owner's account, the debt thus incurred by the factor is a fiduciary one, and under the United States Bankrupt Act of 1867, is not affected by the factor's discharge in bankruptcy.

The balance due by a factor to his client whether liquidated by the promissory note of the factor, or not, is not, in the hands of a transferree of the client, a fiduciary debt, and therefore is extinguished by the factor's discharge in bankruptcy.

APPEAL from the Fifth District Court. *Rogers*, J.

Barrow & Pope and *Harry L. Edwards* for plaintiff and appellee.

Singleton & Browne and *E. W. Huntington* for defendant and appellant.

The opinion of the court on the original hearing was delivered by MARR, J., and on the rehearing by MANNING, C. J.

MARR, J. In February, 1870, Louis Desobry, who resided in the Parish of Iberville, deposited with Henry Tête, a commission merchant of New Orleans, $22,000, for which Tête gave him a receipt as follows: "$22,000. Received, New Orleans, February 3d, 1870, from Mr. Louis Desobry, the sum of twenty-two thousand dollars, to be invested for his account, interest on said amount to be paid every six months."

On the eighteenth February Desobry placed with Tête the addi-

tional sum of $3000, of which $2000 were withdrawn on the sixth February, 1871, leaving balance, $23,000, in the hands of Têtе.

Têtе was the factor and commission merchant of Dardenne and wife, and on February 10, 1872, there was a balance due them of $2000, which Dardenne left with Têtе, taking Têtе's note for the amount, at one year, to his order. On the eleventh August, 1873, Dardenne and wife transferred this note to plaintiff.

Têtе was also the commission merchant of Edward Desobry; and, on the twenty-fourth January, 1873, there was a balance in his favor of $1068 48. On the fourteenth August, 1873, Edward Desobry transferred this account to plaintiff.

Têtе suspended about January, 1873. On the twenty-sixth July he was adjudicated a bankrupt, on his own petition; and, in due course, he was finally discharged.

In November, 1873, this suit was brought by Louis Desobry to recover the aggregate of the several claims just mentioned, amounting to $26,065 48. Têtе pleaded and relied solely upon his discharge in bankruptcy. The District Judge, on the authority of the decision in Banning vs. Blakely, 27 A. 257, that commission merchants when exercising their functions as such are acting in a fiduciary capacity, and are not relieved from their obligations, contracted in that capacity, by a discharge in bankruptcy, rendered judgment in favor of plaintiff for the full amount demanded. The question is was this a correct interpretation of section 33 of the Bankrupt Act, which is as follows:

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act."

The allegation of the petition with respect to the debt represented by the note of February 10, 1872, is: "That said sum of $2000 remained a trust fund in the hands of Têtе; and he is bound to account for the same as such."

Têtе says, after selling the crop, there remained a balance to the credit of Dardenne of something over $2000; that Dardenne took the excess and asked Têtе to give his note for the $2000; and that he Têtе, did not propose this mode of settlement.

Dardenne being asked why the note was given, why he took the note, answered: "I stated to Mr. Têtе that I did not wish any amount to show, or any balance to show upon his books to my credit: That I was afraid my creditors would garnishee it in his hands, therefore I wished to protect myself as a precautionary measure on my part. I said the money shall remain here, and to show that the money is here I will take your note for the sum; and he gave me his simple note without interest. I told him I did not want it to show on the books;

and that still left the money in his hands." He also states that while he held this note he drew sight drafts on Tête which were paid.

Whatever the relations between Dardenne and Tête may have been originally, their relation with respect to the $2000 after the giving of the note, February 10, 1872, was simply that of debtor and creditor; and that relation did not result from any suggestion on the part of Tête, but from Dardenne's dishonest purpose to secure the money against the pursuit of his creditors, according to his own testimony. His statement indicates that he used part of the money, at least, for plantation purposes, by sight drafts on Tête. This part of the demand of plaintiff deserves no further notice or comment; and it may be eliminated at once.

The allegation of the petition with respect to the account transferred by Edward Desobry to Louis Desobry is that the balance shown by that account "is a trust fund in his (Tête's) hands."

This account begins January 17, 1872, with a balance of $2583 60, in favor of Desobry, from the last account rendered. Desobry shipped his crops to Tête, which Tête sold for his account, and carried proceeds to his credit, the whole amounting to $8266 20. He ordered goods and supplies, which Tête bought and shipped to him, from time to time during the year; and he drew sight drafts on Tête as his convenience required, amounting to $7200 72, to his debit, leaving balance due him at the close of the account, January 24, 1873, $1065 48.

In Chapman vs. Forsyth, 2 Howard 208, suit was brought in the Circuit Court of the United States, to recover the proceeds of 150 bales of cotton, shipped to and sold by Forsyth, a factor and commission merchant, for account of the owner. Forsyth pleaded his discharge under the Bankrupt Act of 1841; and plaintiff demurred. The judges were divided in opinion; and one of the questions certified to the Supreme Court of the United States was:

"Is a commission merchant and factor, who sells for others, indebted in a fiduciary capacity, within the act, provided he withholds the money received for property sold by him, and which property was sold on account of the owner, and the money received on the owner's account?"

The first section of the bankrupt act under which this question arose excluded from the operation of the discharge "debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, *or while acting in any other fiduciary capacity.*"

The court decided, without dissent, after full argument, that the factor was not acting in a fiduciary capacity, within the meaning of the act, in the case stated.

It is obvious that the words used in section 33, of the act of 1867, "*While acting in any fiduciary character*," mean nothing more, nothing less, than the corresponding words in the first section of the act of 1841, "*while acting in any other fiduciary capacity.*" The words "character" and "capacity," as used, are synonymous; and the other slight difference in the phraseology is the necessary consequence of the omission, in the act of 1867, of the words, "executor, administrator, guardian, or trustee," used in the act of 1841. As these several fiduciaries are specially mentioned in the act of 1841, it was necessary, in order that all fiduciaries should be included, to use the word "other" between the words "any" and "fiduciary;" but as the act of 1867 does not designate any fiduciaries specially, it was necessary to suppress the word "other" and to use only the word "any," in order to include all fiduciaries, as the intention of both acts was.

In Owsley vs. Cobin, Nat. Bankrupt Register, 15, p. 489, the plaintiff shipped to defendants certain goods for sale on commission, which defendants sold; and they rendered account sales, showing net proceeds, which they failed to pay. The question was whether this was a debt contracted in a fiduciary capacity, within the intendment of section 33 of the act of 1867. The case was tried in the Circuit Court of the United States in South Carolina, in June, 1877, before the Circuit Judge and the District Judge. Under instructions by the court the jury found a verdict for the defendants. There was a motion for new trial, which was heard by Chief Justice Waite. His opinion was "that the debt due by the defendants in this case, as factors or commission merchants, is not such a debt, contracted in a fiduciary capacity, as is contemplated by the act of Congress to be excepted from the operation of a discharge in bankruptcy." And the new trial was refused. It will be observed that these two cases differ essentially from the case under consideration. It does not appear in Forsyth's case, nor in Cobin's case, that there was any account current between the factors and the owners of the goods; and the relation between them, on the facts stated, was apparently that of principal and agent, purely and simply.

In the present case the account sued on begins with a balance, showing previous dealing. It was an account current running through an entire year. Every one doing business with a factor and leaving balances in his hands, against which he draws at sight, at his pleasure, understands that the factor does not keep the money in his safe or about his person; and that, in the nature of things, he could not open a separate bank account, or make special deposits, for each one of the numerous persons whose property he has received and sold on commission. By common consent, and necessarily, in all such cases, the money

received by the factor is deposited in bank to the credit of the factor; and when the owner demands his, in whole or in part, by draft or otherwise, the factor draws his own check, against his own bank account, for the amount.

In many cases the relation between the factor and those whose property he receives and sells on commission would seem to be merely that of principal and agent. But where the one is receiving and selling, from time to time, and the other draws at his convenience, and there are numerous debits and credits in account current, resulting in a balance in favor of the one or the other, the relation between them is no longer merely that of agency. So well is this understood, that factors, in such cases, in the absence of an agreement to the contrary, usually keep an interest account, which a mere agent would not think of doing. By the consent of both parties, by their course of dealing, the relation is that of debtor and creditor; and the balance with which the account may close, against the factor, is not a debt created by him while acting in a fiduciary character, within the meaning and intendment of the bankrupt act of 1867. We accept the decision of the Supreme Court of the United States in Forsyth's case, and that of Chief Justice Waite in Cobin's case, as authoritative interpretations of statutes of the United States; and we can not assent to the contrary doctrine, maintained by our predecessors in Banning vs. Bleakly, 27 A.

It is not charged in the petition that any part of the demand of plaintiff is "a debt created by the fraud or embezzlement of the bankrupt;" nor are the words "fiduciary character" or "fiduciary capacity" used in the petition. With respect to the balance of account sued for, as in reference to the Dardenne note, the distinct and only charge implying a fiduciary relation is that the amount is a trust fund in the hands of Tête. We do not find the words "trust fund" in section 33 of the bankrupt act; and we can not conceive of any such thing as a trust fund, in any legal acceptation of the term, except such fund as may be in the hands of some public officer, or of an executor, or an administrator, or a guardian, or a trustee, technically so called, and held for the special purposes designated by law, or resulting from the nature of the appointment. We presume that the words are used in the petition to express the idea that these two debts were created by Tête while acting in a fiduciary character. It is clear from the decisions in the cases of Forsyth and Cobin, and in Buckner's case, 2 A. 1023, that they are not trust funds; and that they are not debts created in a fiduciary capacity.

As to the money placed by Desobry with Tête for investment, the allegations of the petition are, that Desobry instructed Tête so to invest as that the interest should be collectible every six months *

* * "That from time to time Tête rendered to petitioner accounts showing the collection of said interest, and petitioner believed he had said funds invested in good securities. But lately, to wit, about the eighteenth January, or shortly afterward, said Tête represented to petitioner that he had never performed the trust confided to him, but had, in violation thereof, unknown to petitioner, retained said funds in his own possession."

The receipt given by Téte is silent as to the manner in which the money was to be invested, and as to the rate of interest. Tête was doing a very large commission business. His credit was very good, and he was reputed to be worth $200,000; and, upon the mere showing of the receipt itself, if he retained Desobry's money, believing, as no doubt he and Desobry both believed at the time, that it was safe in his hands, his use of it in his business would not have involved either actual fraud or moral turpitude, or intentional wrong.

In Neal vs. Clark, 5 Otto, 704, on error to the Supreme Court of Appeals of Virginia, that court had decided that a bankrupt not chargeable with actual fraud, but who had committed constructive fraud under the State law, was not entitled to the benefits of his discharge in bankruptcy. The Supreme Court of the United States reversed the decision of the Virginia court; and held that the "fraud" referred to in section 33 of the act of 1867 "means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith." The constructive fraud committed by the Bankrupt is not within the meaning of the act; and "his discharge in bankruptcy affords him complete protection." P. 709.

It is not charged in the petition, in distinct terms, that there was fraud or embezzlement on the part of Tête. These are grave charges. Either, if proven, would suffice to deprive the bankrupt of the benefits of his discharge; and one of them is a crime, punishable, under the State law, by imprisonment in the penitentiary. They must be set forth and charged in distinct terms before they can be the subject of judicial inquiry: and they are not to be deduced, inferentially, from statements in the pleadings which may be susceptible of a different interpretation. There is nothing in the allegations of the petition from which it can be inferred that Tête intended, at the time he used Desobry's money, to deprive Desobry either of the principal or the interest; or that he did not intend to account faithfully for the interest, at the end of every six months, and to return the principal whenever it should be demanded.

The proof shows that Tête rendered accounts to Desobry every six months; and Desobry admits that they were received by him from

time to time. These accounts include dealings to a large amount; and each of them closes with a balance in favor of Desobry. The form of the entry of the semi-annual interest is the same in all these accounts; and that in the first account will serve as an example: "By six months interest on $22,000, from February 5, 1870, to August 5, 1870, at ten per cent, $1100. By six months interest on $3000, from February 18, 1870, to August 18, 1870, at ten per cent, $150."

There was nothing in these accounts to mislead Desobry, or to indicate that the money had been invested in securities of any kind; and there was no charge, in any of them, for commissions for investing, or for collecting the interest. No one would suppose that a merchant, doing only a factorage and commission business, could afford to look around and find safe securities in which to invest so large an amount, at so high a rate of interest, payable every six months, without some pecuniary compensation; and if any conclusion, as to the manner of the investment, could be deduced from the accounts, it would be that Tête had invested the money in his own business, and charged himself with the interest; and not that he had, gratuitously, made investments on such favorable terms in good securities, and collected and accounted for the interest so promptly for nearly three years, without the loss of a day to Desobry, as a mere matter of friendly agency.

Desobry says he never authorized Tête to retain the money himself, either verbally or in writing. "There were no directions given Mr. Tête in what he should invest my funds; but it was understood these funds would be invested in commercial and mortgage paper which should be doubly and triply secured. This was so understood in the conversation at his office, at which no one but he and myself were present."

Mr. Desobry must have known that those who are able to furnish such securities as he describes can always obtain money, on much better terms than he required, from banks and other corporations, and individual capitalists.

Tête's explanation of this business is: "After giving the receipt to Mr. Desobry he stated that he would rather have a fixed rate of interest for his money, of ten per cent, payable every six months. I told him it would be a hard case if I had to invest the money outside, as frequently the money would be idle, and would have to remain in our hands for fifteen to twenty days at a time, without interest. He said he would rather have the money remain with me, at a fixed rate of interest of ten per cent per annum; and with this understanding I took the money." To the other question: "Did you give him credit accordingly on your books?" Tête answered: "Yes, that account was never charged with any investment made on his account."

Again, Tête was asked whether it was true, as alleged in the petition, that it was only about the eighteenth January that he, Tête, represented to Desobry that he had never performed the trust, etc. He answered that it was not true. After stating that plaintiff knew that he used the money in his business, Tête was asked how he knew that fact. He answered: "Because, the next day after I gave him the receipt for the money to be invested, Mr. Desobry called upon me, at my office, and requested me to use the money in my business, at a fixed rate of interest, at ten per cent per annum, and payable every six months."

This testimony was objected to, and the objection was maintained, on the ground that it tended to contradict or vary the written contract expressed in the receipt; that the receipt created a perfect contract to invest the money for account of plaintiff; and that this testimony tended to prove a second and different agreement, to make a loan and not to invest.

We think the objection was not well taken. The receipt simply shows that the money was to be invested, for account of Desobry, so as to have the interest paid every six months. The testimony did not tend to vary or contradict the receipt in any respect. "Invest" does not necessarily indicate the purchase of property, or stocks, or a loan on negotiable securities. It implies the outlay of money, in some permanent form, so as to yield an income; and the use of the money by Tête, at the required rate of interest, payable every six months, was an investment, in every sense of the term, not different from that expressed in the receipt.

Besides, plaintiff had attempted to prove, *dehors*, and beyond the receipt, that the understanding was that the investment was to be in good commercial and mortgage paper; and such proof was essential to his case. The testimony of Tête was clearly admissible to prove that this was not the understanding.

It was also admissible to disprove the allegation of the petition that Tête, in violation of the trust confided in him, "unknown to petitioner," had retained the money in his possession.

If we should balance the testimony of Desobry by that of Tête, the allegations of the petition would simply be not proven. The testimony of Desobry, as to the manner in which the investment was to be made, is not supported by any proof in the record; and his statement that it was to be doubly and triply secured, by commercial and mortgage paper, presupposes a stringency in the money market, and a superfluity of good securities, which do not usually co-exist, and which, in the nature of things, could be but temporary.

The testimony of Tête is strongly corroborated by the entire his-

tory of this business. From February, 1870, up to January, 1873, when Tête suspended, no inquiry was made by Desobry, no question asked as to how his money had been invested. He had the receipt in his possession, and knew that it contained no limitation of Tête's discretion as to the manner of investment, except as to the payment of the interest, the rate of which it did not fix. Tête's clerks prove the manner in which the accounts with Desobry were kept, from the beginning, and the frequent rendering of accounts to Desobry. The large dealings between Tête and Desobry, and his son, Edward Desobry, and his son-in-law, Dardenne, running through several years: the credit which Tête enjoyed, and his reputed wealth, make it more than probable that Desobry would have preferred to leave his money in the hands of Tête, at a fixed rate of interest, rather than to rely on the uncertainty of finding equally safe investments otherwise, on the required terms.

The debt to plaintiff was not created while Tête was acting in a fiduciary character, within the intendment and meaning of section 33 of the bankrupt act, as interpreted by the Supreme Court of the United States, and the Circuit Court, in the cases cited: There is no proof of actual fraud, or of intentional wrong, or of moral turpitude on the part of Tête; and there is nothing in the record to take the debt sued for out of the operation of the discharge in bankruptcy.

The judgment appealed from is therefore annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the demand of the plaintiff, appellee, Louis Desobry, be rejected, and his suit and petition be dismissed; and that he pay the costs in this court and in the District Court.

Mr. Justice DeBlanc does not concur in this opinion and decree.

Mr. Justice White dissents and reserves his right to hereafter file his reasons.

On Rehearing.

Manning, C. J. The bankrupt Act of 1841 forbade the discharge of a debtor from debts "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity."

The bankrupt Act of 1867 provided that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while in any fiduciary character, shall be discharged."

The Supreme Court of the United States held that a factor was not within the exceptions of the Act of 1841, not being included in the general designation 'other fiduciary capacity'—ruling that those words

must mean the same class of trusts as those specifically mentioned, all of which were special and not implied trusts. Chapman v. Forsyth, 2 How. 202. There has been no decision of that court upon this portion of the corresponding clause of the Act of 1867, the case of Neal v. Clark, 5 Otto, 704, dealing alone with that part of the clause which relates to 'fraud,' and settling only that constructive fraud is not within the meaning of that Act.

Meanwhile the State courts have differed as to whether the changed phraseology of the last Act imparts to it a different meaning from the first.

The Massachusetts court hold that the phrase 'fiduciary character' does not include the obligation of a debtor, to whom accepted bills of exchange were delivered by their owner with directions to collect them and apply so much of their proceeds as was necessary to the payment of debts owing by the owner to the estate of a deceased person, of whom the debtor was administratrix—saying that the phrase implies a fiduciary relation existing previous to or independent of the particular transaction from which the debt arises, and that in that case the debt arose out of a single transaction and its creation involved no element other than that of contract. The court there apply the ruling in Chapman v. Forsyth for the reason that the language of the two bankrupt Acts is "substantially the same." Cronan v. Cotting, 104 Mass. 245.

The Missouri court say the language of the Act of 1867 seems to have been made broader intentionally, and that a factor stands in a fiduciary relation to his principal in respect to the proceeds of goods sold, and his debt thus incurred is not discharged under that Act. Lanecke v. Booth, 47 Mo. 387. Similar decisions have been made by other courts which were elaborately set forth in Banning vs. Bleakely 27 Annual, 257, in which case the same doctrine was maintained, and was reiterated in Brown v. Garrard, 28 Annual, 870.

The U. S. Circuit Court, sitting at New York, had the question squarely presented, and Nelson J. said the provision in the Act of 1867 was much broader than in the Act of 1841, and therefore the case of Chapman v. Forsyth did not control the construction of the later Act. *In re* Kimball, 6 Blatchf. 292. On the other hand, in the U. S. Circuit Court, sitting at Charleston, Waite C. J. ruled that the debt due by the defendant in that case as a factor or commission merchant is not such a debt, contracted in a fiduciary capacity, as is contemplated by the Act of Congress to be exempted from the operation of a discharge in bankruptcy. Owsley v. Cobin, 15 Nat. Bankr. Register, 489.

Whatever may be the grounds of these conflicting decisions in the State courts and the U. S. Circuit Courts,—whether based upon the idea that the language of the Act of 1867 is more comprehen-

sive than that of 1841, or that the relation of a factor to his principal, *quoad* the proceeds of goods sold, is essentially fiduciary in its character—the legislation of this State has attached the quality of a trust to that relation, has conferred upon it the responsibilities ensuing therefrom, and has affixed criminal penalties to its violation. Rev. Stats. sec. 905.

The words 'while acting in any fiduciary character,' employed in the Act of 1867, will be construed in each State with reference to its own legislation, and the present contrariety of opinion will doubtless continue until a decision of the U. S. Supreme Court shall have definitively settled their interpretation. The legislation of this State has stamped the relation of the factor with his principal with the character of a fiduciary, and the consequences of that relation having been formally adjudicated in Banning v. Bleakley, we shall adhere to that ruling and apply it to the present case.

Upon the matters of fact tending to shew what relation existed between Tete and Desobry, we are satisfied that it was fiduciary in its character as to the sum of $22,000 for which the receipt of Feb. 3, 1873 was given, and as to the sum of $1,000, balance of account on Feb. 18, 1873. If the testimony, offered to shew a parol agreement, varying the written receipt, be admissible, the most that can be said of it is that it is contradictory, and does not conclusively establish the change of the contract. If it be inadmissible, the receipt speaks for itself, and the accounts rendered Desobry by Tête from time to time are in conformity with the stipulation in the receipt that the money was "to be invested for Desobry's account." In these accounts Desobry was credited with the revenues derived from the investment, as if they were collected from third parties.

But Tete did not hold the relation of fiduciary to Desobry as to the Dardenne note for $2000, nor as to the balance of account with Edward Desobry, both of which were acquired by Louis Desobry by transfer. The judgment of the lower court was error as to these two items. Therefore

It is ordered and adjudged that our former decree is set aside and annulled, and that the judgment of the lower court is reversed as to the two items of $2,000 and $1,065.48, and is affirmed for the sum of twenty-three thousand dollars with five per centum per annum interest from February 18, 1873 and the costs of the lower court—the costs of this appeal to be paid by the plaintiff and appellee.

ON REHEARING. DISSENTING OPINION.

MARR, J. I can not concur in the opinion and decree pronounced on the rehearing in this case; and I adhere to the views expressed in the original opinion.

If it be conceded that the pleadings are sufficient to raise that issue, the single question would be, "was the debt created while Tête was acting in any fiduciary character, within the meaning and intendment of the bankrupt act?" and I do not think that the law of Louisiana, Revised Statutes of 1870, section 905, has any bearing on this question.

This section is but the re-enactment of section 81 of the act of 1855, p. 142, which was the re-enactment of section 1 of the act of 1845, p. 46. The single object of this statute was to punish the crime of embezzlement; and the penalty is imprisonment in the penitentiary, at hard labor, for not less than one year and not more than seven years. This penalty is imposed upon "any servant, clerk, broker, agent, consignee, trustee, attorney, mandatary, depositary, common carrier, bailee, curator, testamentary executor, administrator, tutor, or any person holding any office or trust under the executive or judicial authority of this State, or in the service of any public or private corporation or company, who shall wrongfully use, dispose of, conceal, or otherwise embezzle any money, bill, * * * or any other property which he shall have received for another, or for his employer, * * * or by virtue of his office, trust, or employment, or which shall have been intrusted to his care, keeping, or possession by another," etc.

These terms are broad enough to include all persons who can commit the crime of embezzlement; but the statute does not use the word "fiduciary;" nor does it attempt to declare what shall constitute a "fiduciary character." The essential difference between larceny and embezzlement is, that the possession of the thing stolen was wrongful *ab initio* while embezzlement can only be committed by one whose possession was, originally, lawful. In neither case can the crime be committed without the intent to deprive the owner of his property.

The fact that Tête accounted to Desobry semi-annually, for the interest agreed upon, ten per cent, for nearly three years, and the additional fact that in none of the accounts rendered by Tête was there any charge by way of commission or otherwise, for investing the capital, or for collecting and accounting for the interest, prove conclusively to my mind, the absence of any such intent; and these facts would have necessitated the acquittal of Tête, if he had been prosecuted for embezzlement.

No one can be deprived of a right, in consequence of crime, without first having had an opportunity to defend himself against the charge that he committed that crime. When the creditor pretends that the discharge in bankruptcy does not apply to the debt which he demands, because it was created by the crime of embezzlement, the burden is on him to prove the commission of that crime. Even fraud, not punishable as a crime, can not be proven without being distinctly charged; and it would be strange, indeed, if any crime could be inquired into collaterally, in a court exclusively of civil jurisdiction, where that crime is not plainly and unequivocally charged in the pleadings. I incline to the opinion that, where the creditor attempts to hold the bankrupt liable, notwithstanding his discharge, on the ground that the debt was created by embezzlement, he is bound to produce the record of conviction of that crime.

The final decree in this case is not based upon the assumption that Tête was actually guilty of the crime of embezzlement, because, every one is presumed to be innocent of crime until his guilt has been proven: because he was not even prosecuted for, much less convicted of this crime; and because he was not charged with it in the pleadings. The opinion proceeds upon the theory that the statute referred to raises to the dignity of a "fiduciary character" each one of the persons punishable for embezzlement; and that this crime can be committed only by one who is acting in a "fiduciary character."

It is certainly true that embezzlement can not be committed by any other than one in whom a certain degree of confidence has been reposed; but the question still remains, "Can the crime of embezzlement be committed only by one who is acting in a fiduciary character, within the meaning and contemplation of the bankrupt act?" In the strongest view of the case against Tête, he was merely the gratuitous agent of Desobry, to invest the money intrusted to him for that purpose. So far as the statute is concerned his liability in this relation is no greater than that of a factor, or of any other of the persons designated, all of whom are placed in the same category with respect to the crime against which it is leveled. If the "fiduciary character" is to be deduced from the fact that Tête occupied toward Desobry one of the relations mentioned in the statute, it would logically follow, as our predecessors decided in Banning vs. Bleakeley, 27 A. 257, that he was acting in a "fiduciary character," with respect to Edward Desobry, whose crops he received and sold as consignee and factor.

I can not accept the decision in Banning vs. Bleakeley as an authoritative interpretation of section 33 of the bankrupt act, because, in my opinion, it is directly in conflict with the jurisprudence of the Supreme and Circuit Courts of the United States as established by the cases cited

in the original opinion. There is nothing in the statute of Louisiana applicable to a factor, or other agent or attorney, which is not equally applicable to menial servants; and the menial servant, with respect to the petty sums intrusted to him for daily domestic purposes, occupies, with respect to his employer, the same relation, differing only in degree and importance, as the clerk, or broker, or attorney, or factor, or other agent. If these persons while performing the functions of their engagements are acting in a "fiduciary character" simply because the statute makes them amenable to a criminal prosecution for embezzlement, the menial servant occupies the same relation, for the same reason, while performing the functions of his employment.

The mere reading of section 33 of the bankrupt act shows that the Congress meant and intended that the crime of embezzlement might be committed by one who was not acting in any fiduciary character, within the purview of that section: that there might be a defalcation of a public officer which would not constitute the crime of embezzlement; and that a debt might be created by one while acting in a fiduciary character which would neither be the consequence of the crime of embezzlement nor of a defalcation by a public officer. I can not undertake to say precisely what the Congress meant by the words "any fiduciary character," nor how that character is to be created; but it seems clear to me that the courts of the United States, in the several cases cited in the original opinion, maintain the doctrine that the fiduciary character contemplated is not the relation which the law of any State may imply from the contract out of which the debt or pecuniary obligation arises. The Constitution has conferred upon Congress no power to establish any other than uniform laws on the subject of bankruptcies, throughout the United States; and uniformity requires that the discharge shall be operative alike, to the same extent, in each and all of the States. In one State certain debts and obligations may be treated as fiduciary, which in some other State might not be so regarded; and if reference is to be had to the local laws and jurisprudence of any State, in order to ascertain what is a fiduciary character, in the intendment of the bankrupt act, it might well happen that the discharge would be an effectual bar in one State while in another State it would not relieve the bankrupt.

In my opinion the testimony of Tête was admissible; and, taken in connection with all the facts and circumstances of the case, it satisfies me, as a matter of fact, that the relation between him and Desobry was, with the knowledge and by the consent of Desobry, that of debtor and creditor: that the debt was not created by fraud or embezzlement on the part of Tête, nor while he was acting in any fiduciary character, within the scope and meaning of the bankrupt act; and that it is not excluded from the operation and effect of the discharge.

The concurrence of all the other members of the Court in the opinion and decree pronounced on the rehearing, has made it necessary for me to state the grounds of my dissent. The questions involved are of very great importance; and they are so presented in this case that they may be reviewed and finally settled, as I trust they will be, by the arbiter in the last resort, the Supreme Court of the United States.

No. 7576.

STATE EX REL. FRANK MOREY VS. THE JUDGE OF THE FIFTH DISTRICT COURT.

Where a petition is filed praying, for certain alleged reasons, the forfeiture of the charter of a banking corporation, an order of court, which does not decree the forfeiture, but which merely appoints commissioners to take charge of the assets of the corporation, can not be construed as directing the liquidation of the affairs of the corporation.

An order of court rendered in chambers can not operate to forfeit the charter of a corporation when the issue of forfeiture, *vel non*, was put in question by the answer

A stockholder of a corporation has an interest to prevent the sale of the corporate property by persons having no legal power or mandate to sell.

An interlocutory decree ordering a sale of corporate property to be made by persons without legal power to sell, may inflict irreparable injury on a stockholder of the corporation, and hence may be suspensively appealed from by him.

The fact that a corporator might seek recourse on the bond of the seeming liquidators of the corporation, on account of the sale of corporate property by them, demonstrates his right of appeal from a decree of court ordering the sale.

APPLICATION for writs of mandamus and prohibition.

Joseph P. Hornor and *Francis W. Baker* for relator.

W. S. Benedict for respondent.

The opinion of the court was delivered by

WHITE, J. The relator seeks by mandamus and prohibition to compel the granting of a suspensive appeal from an order directing the sale at public auction of certain real estate and movables, the property of the Citizens' Savings Bank. The proceedings disclosed by the record are as follows: On October 2, 1879, E. V. Hitch filed a petition alleging that the aforementioned corporation had by various acts, which were specifically enumerated, violated its charter, and prayed for judgment decreeing the forfeiture of defendant's charter and for an inventory and the appointment of liquidators. On the same day, an answer was filed in the name of the defendant, denying that the charter had been violated, but admitting the facts alleged, and concluding by submitting the case to the judgment of the court. Thereupon, on the same day, the following order was rendered:

"The foregoing petition, with the answer and the evidence therewith submitted, being duly considered, and being of opinion it is necessary an officer of the court do take charge of the property and assets of the Citizens' Savings Bank:

"It is ordered that E. V. Hitch and P. H. Legendre be and they are hereby appointed commissioners of said bank on their taking oath and giving bond, each in the sum of fifteen thousand dollars conditioned according to law. It is further ordered that Octave Morel, notary public, do take an inventory of the assets of said bank, and that George Palfrey and F. A. Luminais be appointed appraisers to value the same; and let all proceedings against said bank or its property be stayed."

Various other proceedings were had, not pertinent to the present inquiry, and, on the 10th of October, the commissioners applied for authority to sell certain real estate and movable property, which was allowed. The relator, alleging and swearing that he was a large stockholder, having an interest exceeding five hundred dollars, and that the order to sell would illegally entail irreparable injury on him, asked a suspensive appeal; which being refused, aid of this jurisdiction was invoked.

In answer to the alternative writs; the court *a qua* says the appeal was refused for, in substance, the following reasons:

1. Because the corporation having been previously placed in liquidation by the appointment of liquidators, the order of sale was simply an act of administration, and, therefore, not susceptible of being suspensively appealed from.

2. Because the relator, being a stockholder, was really a defendant, and could not by way of appeal frustrate or delay a previously ordered liquidation.

3. Because the order of sale was not a final judgment, and not an interlocutory one from which irreparable injury could result.

4. Because if any injury could result from the order of sale, the recourse of the relator was on the bond of the liquidators.

In considering the sufficiency of the return the inquiry is twofold: the first, as to the order of sale being not susceptible of a suspensive appeal in consequence of its having been rendered as an auxiliary or supplement to a previous decree of forfeiture and consequent liquidation; the second, because of its interlocutory nature and the legal impossibility of irreparable injury flowing from it. We must, as a matter of course, upon the first branch of the investigation examine the proceedings which are referred to by the answer, for the purpose, not of reviewing them, but of determining their nature as affecting the order from which the appeal was prayed and refused.

So doing, we conclude, as a matter of fact, that no such order as

one directing the liquidation of the affairs of the corporation was ever rendered. Two commissioners were appointed by the court to take charge of the property and assets of the Citizens' Savings Bank. But these commissioners in the nature of things must have been intended, and in legal contemplation can only be considered, as custodians or *quasi* judicial sequestrators. R. S. 294. The forfeiture of the charter was a legal prerequisite to its liquidation, and no such decree seems to have been rendered. The order appointing the commissioners was rendered on the same day the petition was filed; it was not in terms a decree of forfeiture, and it could not have legally so operated, as it was rendered in chambers and out of term, when the issue of forfeiture *vel non* was put in question by the answer. Bank vs. Dawson, 13 L. 506; 15 L. 26; 5 A. 179; 9 A. 265.

Taking this view of the proceedings, the second question is freed from serious difficulty. That a stockholder has an interest in preventing the sale of the property, real and personal, of the corporation by persons having no legal power or mandate so to do, does not brook discussion. That the sale of the assets whilst the corporation is yet in being by liquidators, so denominated, without legal warrant, may entail irreparable injury, seems equally clear. 22 A. 200. The fact that the corporator might seek recourse on the bond of the seeming liquidators is a demonstration of the right to the appeal. 12 A. 455.

The writs are made peremptory, with costs.

No. 7515.

THE STATE VS. SANDFORD MILES.

An arrest of judgment in a criminal case will not be allowed on the ground of a want of qualification of the jury commissioners. Such an objection must be made in the preliminary stages of the trial.

APPEAL from the Thirteenth Judicial District Court, parish of Concordia. *Hough*, J.

H. N. Ogden, Attorney General, for the State.

G. F. Bowles for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was indicted for and convicted of shooting one Tatum with intent to murder, and was sentenced to imprisonment at hard labour for five years. He moved in arrest of judgment on three grounds;—

1. The jury commissioners were not sworn before the drawing of the jury.

2. The evidence of the selection and appointment of the jury commissioners who drew the jury for that term of the court does not appear on the minutes.

3. It does not appear of record or upon the minutes that the jury commissioners were sworn before drawing the jury.

The objections come too late, and are not good grounds for a motion in arrest of judgment. They should have been pleaded at an anterior stage of the trial. The practice has been long settled not to arrest judgment on the ground of irregularities in the summoning or the procedure of the grand jury. Wharton Crim. Law 863 citing numerous authorities. State v. Swift, 14 Annual, 827. And the same rule applies to the petit jury.

An objection to the mode, or the want, of qualification of the jury commissioners should have been made in the preliminary stages of the trial. The prisoner cannot take the chances of a trial by a jury of his own choice, or to which he does not object, and afterwards avail himself of irregularities in its selection or composition by a motion in arrest after a verdict against him. State v. Alverez, 7 Annual, 284.

Judgment affirmed.

No. 7642.

CITY OF NEW ORLEANS VS. LOUISIANA SAVINGS BANK AND SAFE DEPOSIT CO.

A law exempting the shares of stockholders and all the other property of a corporation from taxation, except its real estate, is unconstitutional.

The assessment of the property of a tax-payer on the assessment rolls, and the methods used in fixing its value are presumed to be correct until he proves the contrary.

A law imposing on a corporation the payment of the taxes on its stock by its shareholders is constitutional.

It is not necessary that the assessment roll should *itemize* the property of a corporation over and above its capital stock, designated as surplus.

In assessing the real estate of a corporation its present, and not its cost value, is the standard of valuation.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

S. P. Blanc, Assistant City Attorney, for plaintiff and appellee.

Chas. S. Rice and *W. S. Benedict* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Plaintiff sues defendant to recover the following taxes:

1st. The tax on its assets and property over and above the capital stock, exclusive of real estate and non-taxable property. This surplus is estimated and assessed on the roll at $39,669.

2nd. The tax on shares of stockholders in said company, after deducting the real estate and other property otherwise assessed or exempt from taxation. These shares are assessed against each stockholder by name, and their aggregate value is fixed at $406,900 on the assessment roll.

The defense is, first, that by the third section of act 70 of 1870, incorporating the defendant bank, it is exempt from taxation "except on its real estate," and that it has paid its real estate tax.

The present Court and its predecessor under the constitution of 1868 have so often held that such exemption as that here claimed was beyond the constitutional power of the General Assembly that we are not disposed to re-state the grounds of that opinion.

See 31 A. 292; 31 A. 440; 31 A. 637; 31 A. 519; 27 A. 376; 27 A. 646; 27 A. 648; 28 A. 512; 28 A. 498; 28 A. 756.

The second defense is, that the assessment of $39,669, as surplus over and above its capital, has no foundation in fact to rest upon. That it owns no such surplus. If it were conceded, that, after the rolls have been exposed and advertised for correction as required by law the correctness thereof is still open to controversy, still in the present case no proof was tendered of this allegation, and the assessment must stand, as at least *prima facie* correct. The onus of showing the error was on the defendant. "N. O. vs. Canal Bank," 29 A. 851, and same case decided by Supreme Court of the United States, October term, 1878.

The third ground of defense is, that "the record does not show that the requirements of law, under which the pretended assessments were made, were complied with." The roll seems to be in the form prescribed by law, and the presumption is that proper methods of ascertaining values were resorted to by the assessors.

The fourth point is, that admitting the right of the State to impose a tax on the shares of the shareholders in banking corporations, and that the State may compel the banks to pay the tax so levied, yet the charter exempts this bank from paying taxes on these shares. That such taxes must be collected therefore from the shareholders themselves. We have seen that the exemption conferred on this bank was from taxation, "except on its real estate." We have seen that that exemption was unconstitutional—and therefore void. But even if it had been valid, we do not see that it would have prevented the Legislature from imposing on it the payment of the taxes due by its shareholders—since its property, profits, and assets belonged to the shareholders ultimately. In such a case we have no reason to believe that such an imposition violates the constitution, and no reasons have been advanced by defendant in support of the alleged unconstitutionality. This case differs

essentially from that of "Citizens' Bank vs. Bouny, Tax Collector," lately decided. (No. 7368.)

It is next complained that the roll exhibited in evidence does not show the description and value of any real estate. This suit is not for taxes on its real estate. That was otherwise assessed, and defendant alleges that that tax has been paid. The roll does show that a deduction of $93,100 was made from the capital of the company before fixing the value of the shares assessed. We presume that deduction was composed of the real estate otherwise assessed, and of property exempt, such as U. S. bonds, etc. We must presume, in the absence of proof to the contrary, that the assessors did their duty.

Again, it is said that the roll does not itemize the property assessed as surplus. In the nature of things it could not do so. That amount is charged as being the excess of the value of defendant's property, etc., over and above the amount of its capital.

Lastly, it is said that the real estate of the bank was only assessed at $30,000, when it originally cost $102,000, and that the latter sum should have been deducted in fixing the value of shares. It is the present value, and not that of 1870, that is to be deducted. Besides, if $102,000 was the proper deduction, then it would have been the proper value upon which to tax the bank on its real estate. What it may have lost through its stockholders' assessment it has gained on its own.

The judgment appealed from is affirmed with costs.

No. 7199.

W. W. WALKER ET AL. VS. CITY OF NEW ORLEANS.

The city of New Orleans has no right to require that persons owning vehicles for hire within its limits, and who have paid their city licenses shall obtain from the city, at a certain fixed and exorbitant price, the plates which an ordinance of the city has prescribed for the convenient identification of the vehicles. Such an exaction is *another* license, in disguise, and therefore unconstitutional.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Edward Phillips for plaintiffs and appellees.

Sam. P. Blanc, Assistant City Attorney, for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. These consolidated suits were brought by owners of drays, hacks, carriages, floats, carts and vehicles, to enjoin the City of New Orleans from enforcing an ordinance, adopted on the 4th of

December, 1877, and which was to go into effect from and after the 1st of January, 1878.

In substance, the enjoined ordinance provides that—besides the license which is to be obtained by any owner or driver of a vehicle kept for hire—they shall pay, for a pair of license plates to be attached to the vehicle, charges or fees which vary from five to twenty dollars.

These plates, which are intended to readily and conveniently identify the vehicles, cost twenty cents a pair; and—under the ordinance—must be taken from the City at from eight to one hundred and fifty times what they cost.

By the 11th paragraph of section 12 of the City charter, its Council is empowered "to regulate the proper government of carts, drays, "carriages, omnibuses, and other vehicles of every description, freight, "locomotive, passenger and street cars, which run in the streets, and "within the limits of the City, and to require that the owners of said "vehicles shall take a license, and to fix the fees and charges of all "vehicles kept for hire."

Acts of 1870, Ex. s. p. 36.

Plaintiffs denounce the charge thus sought to be recovered, as one which is—not only arbitrary and unequal in amount—but, besides, one which is not authorized by any law; and—in his printed argument—the counsel who represents the City, contends that said charge was imposed by the Council, in the legitimate exercise of its police, and not its taxing power.

License laws—according to Cooley—are of two kinds: "those which require the payment of a license fee by way of raising a revenue, and are therefore the exercise of the power of taxation; and those which are mere police regulations, and which require the payment of such license fee as *will cover the expense* of the license, and of enforcing the regulation."

Cooley, on Const. Law, p. 586.

At page 201 of the same book—speaking of the exaction of a license fee with a view to revenue, he says: "the charter must plainly show an intent to confer that power, or the municipal corporation can not assume it."

It is evident, as maintained by plaintiffs' counsel, that the authority conferred on the Council "*to fix the fees and charges of all vehicles kept for hire,*" is widely different from that which it had exercised. That clause merely empowers the Council—in order to guard against and prevent extortion—to fix the compensation which the owners and drivers of vehicles shall be entitled to claim for their use. The plain terms of that plain clause, repel and exclude the bold pretension that the City could or can sell, and compel its inhabitants to purchase—at from

five to twenty dollars, that which, at any time and nearly everywhere, they could procure for twenty cents.

The city may—for purposes of identification and inspection—require that plates be attached to vehicles kept for hire, and prescribe the form of those plates; but it can not—under the pretext of securing that distinctive mark—impose, on an already taxed and legitimate industry, an exaction which—by whatever name it may be called—is but a disguised and additional license.

Under the 20th paragraph of section 12 of its charter, the City is empowered to levy, impose and collect a license tax upon all persons pursuing a calling, etc. That done, and as to those who pursue but one calling, its power—in that respect—is exhausted, and—thereafter—it can, under no provision of its charter, impose a license charge on the drays, wagons, carts, floats and vehicles belonging to those who have paid for the privilege of using them in their callings.

"The right to exact that license, is yet more evident—we are told—when we reflect that expensive pavements are laid and the streets formed, solely for the purpose of affording a passage to vehicles"—but, is this done for the exclusive benefit of the owners and drivers of those vehicles? Is it not for the advantage of factors, merchants and financiers that drays and floats go from the unloading steamers to the presses, thence to the vessels? Is it not for the convenience of others, that hired carriages are seen constantly moving in every direction, towards atheatre or a graveyard? As their owners and drivers, those who use them contribute to the inevitable injury done to the pavements, and should—in equal proportion—contribute to their repairs.

"The constitution requires that a *license tax*, as well as a tax on property, shall be equal and uniform. To be equal and uniform, the tax imposed must be the same upon all who engage in the particular profession or calling taxed," without regard—as in this instance—to the number of wheels of the vehicles, or the number of horses by which they are drawn. Whether by the State or by the City, but one license can be imposed upon those who pursue but one occupation. 30 A. 1094; 28 A. 102; 23 A. 449, 663; 22 A. 440; 20 A. 373; 10 A. 56; 11 A. 739. Const. 1868, art. 118.

The vehicles and horses of plaintiffs have been assessed and taxed in proportion to their value. The tax thus levied has been paid by them. To pursue their occupation, they are disposed and ready to take out and to pay a license tax, one which will assist in defraying—not only the cost of the license itself—but, generally, all the expenses incurred by the city in carrying out the provisions of its charter. Their tender fills the measure of the only license which—either under the constitution or the laws—can justly be exacted from them. They do not belong to a class

which, in the interest of the State or the City, should be taxed out of existence.

The license charge or fee claimed from them is unreasonable and illegal, exorbitant and unconstitutional.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

Rehearing refused.

No. 7618.

M. C. BARRY, INSPECTOR, ETC., VS. GARNIER, ETC.

This court is without jurisdiction of an appeal from a judgment condemning a party to pay a penalty, or forfeiture of fifty dollars, imposed by a statute of the State.

APPEAL from the Third Justice of the Peace for the parish of Orleans. *Buisson*, J.

Frank D. Chretien for plaintiffs and appellees.

Chas. Louque for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. The action—in this case—is brought against defendant by M. C. Barry, as Inspector of Weights and Measures and informer, and by the city of New Orleans, to recover from him a fine of fifty dollars, for having sold—in violation of sections 3921 and 3923 of the Revised Statutes—an unstamped and incorrect measure.

The judgment appealed from strictly corresponds with the plaintiffs demand and was rendered in their favor for the amount of the fine imposed by the State law.

A motion is made to dismiss the appeal, for the reason that our jurisdiction does not extend to the matter in dispute.

In answer to that motion, defendant contends:

1. That the laws relative to weights and measures are not self-acting—that the Common Council of New Orleans are authorized to pass ordinances to insure, within the limits of the city, the execution of these laws—R. S. 3915—and that, as without such an ordinance, their execution is not insured, the fine is therefore imposed by said city.

2. That if the fine be imposed by a State law, the State alone—through its proper officers—can sue for its violation.

That the fine is imposed by a State law, and not by a city ordinance, there is not the slightest doubt. It is the State law alone which provides: "that no person shall buy or sell—by weight or measure, which does not correspond with the standard therein referred to, or is not

stamped after the parishes have procured said standard, under the penalty of fifty dollars for each offence, etc."

Rev. St. sec 3921.

When the matter in dispute is under five hundred dollars, our jurisdiction extends to only those cases in which the constitutionality or legality of any tax, toll, or impost of any kind or nature whatsoever—or any fine, forfeiture, or penalty imposed by a municipal corporation. shall be in contestation—and, in criminal cases, on questions of law, whenever * * * a fine actually imposed exceeds three hundred dollars.

Const of 1868, art 74.

Here, the matter in dispute is not a tax, toll or impost, nor a fine, forfeiture or penalty imposed by a municipal corporation, but a penalty of fifty dollars imposed by a State enactment, and which—according to the terms of the enactment—is "to be recovered before any tribunal of competent jurisdiction; one half to the benefit of the informer, and the other half to the parish in which the offender resides.

Rev. St. sect. 3921.

That matter—it is evident—does not fall within our jurisdiction.

It is—therefore—ordered that defendant's appeal be, and it is hereby dismissed at his costs.

No. 7488.

MRS. ROSANNA O'KEEFE VS. T. H. HANDY, SHERIFF, ET AL.

Where a married woman, with the authority of her husband, and the sanction of the judge executes a mortgage on her property to secure the payment of money borrowed by her, it is, *prima facie*, valid, and no threats of her husband made out of the presence and hearing of the mortgage creditor, and to which he was not a party, can affect the validity of the mortgage.

The surrender of a matured mortgage-note, and the cancellation of the mortgage, is a sufficient consideration for a second note for the same debt, secured by a second mortgage, and payable at a later date.

The defense by a married woman that although authorized by the judge to execute a mortgage on her property, he did not make the preliminary examination of her required by law, can not be maintained when it appears that after becoming a widow she has voluntarily ratified the mortgage debt by paying the interest on it.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

H. H. Bryan and *Simeon Belden* for plaintiff and appellant.

C. E. Schmidt and *F. D. Seghers* for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. In February last this case was remanded to the lower

court, with instructions to admit and consider some evidence which plaintiff had vainly attempted to introduce on the first trial. That evidence is now before us.

In January 1878, S. C. Young obtained from the 6th District Court—an order commanding the seizure and the sale of certain real estate, the paraphernal property of Mrs. O'Keefe, and which it appears she was twice judicially authorized to mortgage and did mortgage, in 1867 and 1871, and twice to secure an alleged loan of fifteen hundred dollars.

The first of said mortgages—that of 1867—was granted in favor of Louis Mathé, the other in favor of Benjamin C. Young. In the last of the notarial acts passed between Mrs. O'Keefe and the mortgagees, Mathé intervened, acknowledged that his claim had been paid with the funds borrowed from Young, and authorized the cancelling of the mortgage securing its payment.

The evidence adduced on the trial leaves no doubt that but one loan was made to Mrs. O'Keefe, and it was that of 1867, which Mathé testified he made as the agent and with the funds of Benjamin C. Young. As to the act of 1871, it merely was the useless renewal—in the name of the real creditor—of the obligation and mortgage of 1867. The term of that obligation was thereby extended until 1872.

In June 1873, Mr. O'Keefe died, and, thereafter—from the month of December of that year until 1877, his widow punctually paid, as soon as it was due, the interest which accrued on the note held by Young, and he—on that account—extended, not less than five times, the term fixed for the payment of the principal, and would have again postponed the already extended term, had not his debtor failed to satisfy State and city taxes levied on the mortgaged property.

The note referred to was, after its maturity, transferred by the creditor to one of his sons, who obtained an order to foreclose the mortgage by which it is secured, and that order was enjoined by Mrs. O'Keefe on the grounds:

1. That she was not examined by the judge who issued the certificate by which she was authorized to make a loan and mortgage her separate property, and that the recitals contained in said certificate are false and fraudulent.

2. That—to the knowledge of Mathé, who acted as the agent of Young—the money was advanced to her husband, did not enure to her benefit, and that it was by constant threats on the part of the latter that she was induced to execute the note and mortgage.

In answer to Mrs. O'Keefe's injunction, the creditor, after a general denial, specially charges that she has, since the death of her husband and by several payments of interest due on the note, ratified the contract which she now assails.

The law under which the recited contracts were entered into, is plain; it reads:

"A married woman over the age of twenty-one years, may—by and with the authorization of her husband, and with the sanction of the judge, borrow money or contract debts for her separate benefit and advantage, and to secure the same grant mortgages or other securities affecting her separate estate, paraphernal or dotal.

C. C. 126.

When, with the sanction of the judge, she grants a mortgage, the act drawn to that effect, when executed as prescribed by law, furnishes full proof against her and her heirs, and is as binding in law and equity, and has the same effect as if made by a *femme seule.*

C. C. 127 and 128.

Whether as regards a married woman duly authorized, or any other person, fraud vitiates every contract in which it enters; and the effect of the law which we have quoted, merely was—as we held in Barth vs. Kasa—to shift the burden of proof, when its provisions have been complied with, and—in such a case—to constrain the wife who has acted with the judge's sanction, to verify any alleged fraud.

30 A. 942.

It does not appear that either Mathé or Young was a party to the pretended threats and reproaches which it is averred—were brought to bear on Mrs. O'Keefe, by her husband, nor that they heard those reproaches and threats. If made at all, they were made out of their presence, and can in no way affect the creditor's rights. Were it otherwise, who would run the risk of advancing money to a married woman?

26 A. 418.

As a witness in her own behalf, Mrs. O'Keefe acknowledged that she had gone to, and had met the judge; but denied that she had been examined by him, and swore—not only that the money was to be borrowed for her husband—but that she had so stated to Mathé, who absolutely contradicted that part of her declaration, and testified that she had called upon him for a loan of money.

It was not proven that the judge who issued the certificate knew any of the parties, that he was a friend of the husband, or that he was actuated, in that instance, by any improper motive; and—had he been so actuated—how imagine that after the death of her husband, when the cause of her silent apprehensions had ceased to exist, Mrs. O'Keefe—the alleged victim of the most extraordinary conspiration—would have refrained, until the institution of this suit, from denouncing the conspirators and their fraud? How imagine that when, as a widow, she resumed the capacity of which—as a wife—she had been deprived during her marriage, the widow willingly continued to discharge—by partial pay-

ments of interests and for several years—an obligation which—through the fraud of judge and notary, husband and attorney, she had reluctantly subscribed? This seems as unreasonable as improbable.

In reference to the first mortgage, Robert J. Ker, the notary before whom the parties appeared to grant and accept said mortgage, testified that, when a loan was made to a married woman, his invariable practice was to hand the money to her and to no one else, and one of his sons, who—under his dictation—wrote the act of 1867, declared that the money then loaned was delivered to Mrs. O'Keefe, in presence of the notary and witnesses.

These declarations counterbalance—if they do not outweigh—the denials of Mrs. O'Keefe, and—legally—leave uncontradicted the recitals of the notarial act, and—among them—her own acknowledgment that she received the money loaned in 1867.

As to the consideration of the second note and second mortgage, it was the surrender of the note of 1867, and the cancellation of the mortgage securing its payment. That consideration did enure to Mrs. O'Keefe's benefit. That transaction delayed the enforcement of a matured claim, the validity of which is asserted and acknowledged in acts which bear her signature.

The conflict of evidence which marks so many pages of the Record, impels us to pass upon another, an important defence presented and relied upon by the mortgage creditor, and it is that, by the several payments of interest made by her since the death of her husband, Mrs. O'Keefe has ratified the contract of 1871.

That contract, she contends, is one of those which the law prohibits, which never had any legal existence, and to which no ratification can give a validity inconsistent with and repugnant to the prohibition.

Had Mrs. O'Keefe proven, and this she has not done, that she had bound herself for a debt contracted by her husband, we would have paused and considered how the preservation of public order and good morals can be so gravely imperilled by such an act, when the debt is an honest one, that the contract should be classed as one of those which, by our legislation and jurisprudence, are beyond the pale of ratification.

The other ground of nullity urged by Mrs. O'Keefe is that, though she was authorized by the judge to borrow the money and mortgage her property, she was not thus authorized after the preliminary examination prescribed by law. It may be—and on this point we reserve our opinion—that, under special charges and exceptional circumstances, the wife might be permitted to impeach and contradict the judge's certificate; but were she to attempt it, and succeed in her attempt, her contract would still remain one of those which—in the very words of the

Code—" may be made valid after the marriage is dissolved, either by express or implied ratification," and this Mrs. O'Keefe has done after the death of her husband.

C. C. 1786 (1779) 4 L. R. 328.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

No. 7591.

THE STATE OF LOUISIANA VS. THE CITIZENS' SAVINGS BANK.

Before a suit for the forfeiture of the charter of any bank located in the city of New Orleans can be entertained, it is *indispensable* that a petition praying for the forfeiture shall be presented by the Attorney General, or by the district attorney, or by them both.

The officers of a bank are without authority to waive the service of a petition praying a forfeiture of its charter, or to waive the delay within which third persons may intervene to protect their interest, or of filing an answer which virtually confesses the forfeiture of the charter, and admits the necessity of the immediate liquidation of the bank.

A court is without authority to order the liquidation of a bank and the transfer of its assets to commissioners until the propriety of such an order has, on proper inquiry, been judicially ascertained.

APPEAL from the Fifth District Court, parish of Orleans, *Rogers*, J

W. S. Benedict for plaintiff and appellee.

Jos. P. Hornor and *F. W. Baker* for intervenor and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the 2d of October, 1879, the State of Louisiana—through the Attorney General—joined by E. V. Hitch, whose interest in this matter is not disclosed by the pleadings, filed in the 5th District Court, then in vacation, a petition which does not bear the signature of the Attorney General, in which it is alleged that the Citizens' Savings Bank has mismanaged its affairs and violated its charter, and in which it is prayed that said charter be declared forfeited, the liquidation of the Bank ordered, an inventory taken of its assets, a commissioner appointed to take charge of the liquidation, and all proceedings against it stayed, on the grounds—1st: that it has refused to receive and to pay deposits—2d: that it has failed to pay and credit interest on deposits—3d: that it has not invested deposits in the securities authorized by the charter, but has invested them in other and unauthorized ways—4th: that its capital stock has been reduced, its checks and drafts dishonored, its

insolvency acknowledged by its directors, and its dissolution deemed expedient by the holders of at least three fourths of its stock.

In its answer, which—as the petition—was filed on the 2d of October, the defendant admitted the correctness of every charge upon which the demand is based, but denied that it had forfeited its charter, and—on the same day—submitted the case to the decision of the court.

On the 2d of October, the judge—considering the petition, the answer and the evidence—and the whole of that evidence was the Bank's admission—declared that it was necessary for an officer of the court to take charge of the property and assets of defendant, and—in conformity to the parties' pleadings—appointed as commissioners of the Bank, E. V. Hitch and P. H. Legendre, ordered an inventory of its assets and stayed all proceedings against it.

The commissioners thus appointed qualified on the 2d of October, and—on the 10th of said month— applied for and obtained an order to sell, on conditions which they themselves fixed, the banking-house and furniture belonging to defendant.

From the order of the 5th District Court, rendered at chambers and on the 2d of October, Frank Morey—a stockholder—has appealed.

The first section of the act of 1842, on which it is conceded that plaintiff's action is based, provides in plain terms that, in such an action as this, it is the Attorney General himself who shall present the petition, and he is directed so to do whenever any bank of this State—located in the city of New Orleans—shall have incurred the forfeiture of its charter. Under that act, he—or the district attorney—must first ascertain that the forfeiture has been incurred, and that done, they, or either of them, can alone present a petition to have the corporation dissolved. It is a special duty imposed upon them as public officers, one which is attached to their official capacity, and which they can not confide or delegate to others.

Act of 1842, p. 234, sect. 1.

The appellant does not—as defendant's counsel seems to believe—deny that the attorney who prepared and filed the answer, was authorized to do so; but he denies—and in this he is right—that the officers of the Bank, who are mere agents, with limited powers, could—as they did in this instance—have waived the service of the petition which threatened the very existence of the corporation which they represented, waived the necessity of the otherwise indispensable citation, waived the usual delay within which third parties may intervene to protect their interest; and—more particularly—that they could, legally, have assumed the extraordinary privilege of virtually confessing the forfeiture of the charter, and the necessity of an immediate liquidation of the Bank, and —by that confession—which was filed as soon as prepared, and acted

upon as soon as filed, compel the transfer to chosen commissioners of the property and assets of said Bank.

Defendant alleges in his brief, but neither in the petition, nor in the answer, is it alleged that *by a vote* of three fourths in majority of the stockholders, it had been resolved that it was necessary to liquidate the Bank. If any of the stockholders did think and determine that the liquidation was expedient, why didn't they join the Attorney General, verify the pretended violations of the charter and ask its forfeiture? Their tardy approval of the proceedings instituted by one who is designated by counsel as an informant, a nominal party, could—in no way—affect and impair the rights of the other stockholders, and validate—as to them—the irregular proceedings by which they were inevitably taken by surprise.

It has not been alleged by either a creditor, a stockholder, or any one authorized to represent the State—nor has it been shown, except by a confession which we do not impugn, but which—in this particular instance—we do not consider as conclusive, that the Bank has mismanaged its affairs, and—as charged—deliberately failed to conform to the provisions of the act by which it was incorporated, and its assets could not have been—as they were—under these most informal proceedings—transferred into the hands of commissioners, whose appointment was so sudden, that its propriety could not have been inquired into and contested. That propriety was tacitly recognized by the order appealed from, but it was not—as it should have been—*judicially ascertained.*

16 A. 27. 5 R. 63.

The petition and the affidavit thereto attached, the answer and submission to the court, the order which—in its effects—is equivalent to a decree of forfeiture, the oath of the commissioners and their bond, bear but one and the same date—the 2d of October—and as fair as they may be, those proceedings were conducted with a celerity, which—whether intentionally or not—did effectually close the door against the most legitimate interventions; and, in as much as no attempt has been made to justify it—that unusual celerity casts a shadow on the assailed order, and can not be sanctioned.

It is—therefore—decreed that the order of October 2d, 1879, and the proceedings had thereunder, be and they are hereby avoided and annulled, and this action dismissed as in case of nonsuit, at plaintiff's costs in both courts.

No. 7331.

NEW-ORLEANS INSURANCE ASSOCIATION VS. B. L. LABRANCHE ET AL.

A tax sale of property which is afterward ratified by the former owner can not b treated as a nullity, no matter how many latent informalities there may have been in the sale affecting its validity. Such a sale, however voidable, is not void.

A sale which is *prima facie* valid can only be logically attacked in a revocatory action, but if it appear that both parties have consented to fry the issue of the validity of the sale in a collateral proceeding, this court will pass on the issue in that form of action.

A sale however voidable will not be annulled at the suit of one who fails to show that he has been injured by the sale.

Peremption of a mortgage can not take place pending the possession of the mortgaged property by the mortgage creditor, who holds under a voidable tax-sale, and should such sale be annulled the mortgage will revive with the rank it held at the date of the sale.

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Duffel*, J.

Leovy & Kruttschnitt for plaintiff and appellee.

St. Maurice Berault and *E. & J. Legendre* for defendant Montegut, appellant.

The opinion of the court was delivered by

WHITE, J. Montegut, one of the defendants in this cause, was the owner of two notes of Labranche, secured by vendor's privilege, for $3500 each, as evidence of a part of the credit price of a sale of a plantation made by him to Labranche, on the 13th November, 1867, duly recorded on the 18th November, 1867. These notes were merged to judgment against Labranche on the 21st January, 1874, with recognition of vendor's privilege and mortgage. At a tax sale made by the tax collector of the parish in which the property was situated, on the 17th December, 1874, Montegut became the adjudicatee, for $1600 in cash, the sale being duly recorded in December, 1874, and a deed was made by the Auditor to Montegut on the 26th of July, 1875. On 14th January, 1876, by public act, Labranche ratified the tax sale of 12th December, 1874, and the Auditor's deed of July 26th, 1875. The plaintiffs, as holders of two mortgage notes of Labranche, identified with an act recorded the 21st February, 1873, instituted on the 23d November, 1877, the present action against Labranche and Montegut, against the former as their debtor, and against Montegut as a third possessor. They allege the absolute nullity of the tax title to Montegut, without asking that it be so recognized, and pray that Montegut be condemned to give up the property or pay the debt by them held.

The reasons upon which the demand of plaintiffs is founded, are in substance, that the tax sale to Montegut being an absolute nullity, did

not have the effect of freeing the property from mortgages. Second, that Montegut not having reinscribed his mortgage whilst in possession as owner, it perempted on the 18th of November, 1877, and hence that their claim is first in rank.

As to the absolute nullity of the tax sales, we think the pretension at best very doubtful. The constitutional provision giving to all tax sales *prima facie* validity would seem in terms to be a negation of the idea of an absolute nullity when applied to tax sales having a semblance of being, for the proposition that an act must at one and the same time be held *prima facie* good, and yet be considered as never existing, is a bald contradiction in terms. Nor does the reference made by counsel to the opinion of Judge Cooley as to the burden of proof help the fallacy—for if the burden be in favor of the sale, and its validity is to be held sacred until shown to be informal, it would seem that such fact alone whilst leaving room for a relative, would exclude the conception of an absolute, nullity. Be this, however, as it may, as to which we express no opinion, it is manifest that the sale in controversy can not be considered as absolutely null. Even if the *latent* informalities had been such as to give it that nature or want of nature, it has been formally ratified by the owner, and that ratification made it, if it were primordially null, thereafter so only as to the rights of others; in other words relatively so. This view would furnish just ground for the dismissal of plaintiffs' suit, for if the tax sale be simply voidable, the revocatory action should have been resorted to, but as no exception has been taken to the method of procedure, and as both parties have apparently tried the case as if this were a revocatory action, in order that there may be an end to this litigation we will determine the matters presented. The sale to Montegut, then, under the view we have taken, being, if voidable at all, only so to the extent that it prejudiced plaintiffs' rights, the first inquiry which presents itself is, did it so prejudice them in any way? The evidence discloses that Montegut at the time of the sale was the ranking mortgage creditor, holding a claim for over $8900, and that at the tax sale he paid as the purchase price $1600 taxes claimed by the State, *that then, since, and now, the property was and is worth less than one third the claim of Montegut.* Granting, then, the informalities upon which plaintiffs rely, how have they been injured by them? What benefit could they derive from an annulment of the sale? The jurisprudence of this State has long since consecrated the salutary doctrine that courts exist to enforce rights and redress wrongs, and that they will not lend their aid to the annulment of titles where the party seeking their interposition can not possibly take relief from the granting of the remedy invoked. Copeland vs. Labatut, 6 A. 61; Barnett vs. Emerson, 8 A. 503. But plaintiffs contend that they have

an interest in the avoidance of the sale; that Montegut failed to reinscribe his mortgage since the tax sale and possession by him of the property; and hence, if the sale be set aside, they will become the ranking creditors and take the proceeds of the property. Is the position tenable under our law or under the law, of France, which they specially invoke? We think not. Our Code provides, in art. 3409, which is similar to C. N. 2147:

"The servitudes and incorporeal rights which the third possessor holds on the property before his possession of it are revived after his relinquishment, or after the sale under execution made upon him."

Under this unambiguous provision, were Montegut evicted, by the benevolence of the lawmaker would come the *restitutio ad integrum.* The annulment or recision of the sale would have the effect of placing the parties in the position they held before the sale, each party being restored to the rights he then had, and abandoning those which had ineffectually been transported to him. Solon, vol. 1, pp. 62, 63, 64. Larombier, vol. 2, pp. 286, 287, 288. *Restitutio ita facienda est ut unusquis que integrum jus suum recipiat. L. 24, C. de minoribus.* These principles are the outcome of natural justice, and are dictated by the wise motive that courts may not be made the instruments of injustice by lending their aid to enrich one man at the expense of another. Give restitution, and, by the proof in the record, plaintiffs could take nothing from annulling the sale. Plaintiffs, however, say, grant these principles, yet Montegut can not be restored to the mortgage rank he had at the time of the sale, because of non-reinscription. We can not take one provision of law, that which dictates reinscription, and abandon every other. We must construe the whole Code as one statute, harmonizing its provisions, and enforce them all; as well those which say that one can not acquire or have a mortgage on his own property and that which provides the *restitutio in integrum* as, also, the one pointing out the necessity of reinscription. In fact, the principle that no one can mortgage unto himself his own property is axiomatic, *res sua nemine servit* and to say that one must reinscribe against himself would be compelling the doing of that which the law says can not be done. Under our system, a forced sale or adjudication operates, as it were, a purgation of the mortgages on the property sold, so that at the very moment of sale the rights of parties are fixed, unless the sale for some cause be rescinded. The rights being fixed, the reason for inscription ceases. It would be, indeed, an inequitable system which would allow a creditor whose rights against the proceeds would entitle him to nothing to lie in wait for the unsuspecting owner, and when the useful time for reinscription had passed take, by way of action in nullity, that which he could not have obtained by the timely assertion of his rights. Although we are

informed of no principle upon which such an inequitable theory could be sustained, we are told that the jurisconsults and writers of France recognize and enforce it, their law being, it is claimed, like unto our own.

The view, however, taken of the French law by counsel is, we think, entirely erroneous. In France, as in this State, a forced sale under adjudication has the effect of determining the rights of mortgage creditors, and the creditors are no longer entitled to follow the property, except for the quantum of proceeds resulting from the sale, to which their rank at the date of sale entitles them, either by inscription or reinscription. This determination there as here dispenses from reinscription. Troplong, Hypo. no. 720; Grenier, vol. 2, no. 243. "It is a rule," says Troplong, *loc. cit.*, "of unvarying application that whenever a mortgage passes from the position of a real right to that of a right on the price, all the rights of preference immediately and by the force of things revert to this price."

Says Paul Pont, Hypo. no. 1056: "In the case of forced expropriation, we hold, with the majority of authors, and with the prevailing jurisprudence, that it is on the day that adjudication is made that the hypothecary inscription produces its effect as regards the creditors, between themselves and the adjudicatee." The same author says, at no. 1279 and 1280, that the reason of the rule is that a sale made *with the formalities required by law for forced sales* is presumed to bring a just price. But there is another system in France, unknown to our Code, of freeing property from mortgage, and which is called purgation and surrender. It is these provisions which have misled counsel, and by the light of which the authorities so elaborately quoted must be read, in order to their proper understanding. The systems to which we refer are those recognized in art. 2180, par. 3, C. N., as a means of extinguishing mortgages "by the fulfilling of the formalities and conditions prescribed to third persons for purging the property acquired by them." The rules under which the purgation is to be had are found in C. N. 2180 to 2185, inclusive. They give the right to any mortgage creditor who offers an additional price for the mortgage property to compel the purchaser to re-offer it at auction; and a method is provided for distributing the price. This system has given rise to several disputed questions; one of which was, whether the mortgage creditor who becomes owner by purchase or other voluntary title of the property mortgaged to himself and to other creditors of his author, and who has failed to reinscribe his mortgage within ten years, preserves his rank as a mortgage creditor notwithstanding his failure to reinscribe, if either under the hypothecary action or proceedings for purgation he ceases to be the owner and some other becomes the adjudicatee.

The answers of courts and authors have been severally in the negative, because, until the final adjudication of the property and the conclusion of the purgation proceedings the third possessor had and knew he had only a precarious title, which at any time might be destroyed under the law if a higher bidder than himself could be found among his co-mortgagees or third persons. Thus, having nothing but a defeasible title, in order to protect his rights as a mortgage creditor, which he might be called on to exercise at any moment, he should reinscribe, even if the time for making the reinscription should be reached during his precarious possession. It is only when the mortgage has produced its effect by final adjudication or purgation that the obligation to reinscribe ceases, and it is this doctrine of reinscription under the system of purging a property from mortgage which is referred to by Paul Pont, Hypo. nos 1215, 1054, and, incidentally, by Pothier, as, also, Troplong, Hypo. no. 726, *bis*, and the cases of Billouch vs. Samson and Dupre vs. Tongievis, quoted by counsel for plaintiff.

Paul Pont, at no. 1215, in saying that an evicted third possessor could only exercise his right of mortgage when he had reinscribed, refers to his proceeding, nos. 1054 and 1062, and in no. 1054, after laying down the true principle as to recording, says the necessity of reinscription exists as long as the original inscription *has not produced its effect.* Such, also, is the doctrine of Pothier, who, under the ancient law, taught that a mortgage creditor who acquired the mortgaged property was in danger of being primed by creditors of inferior dignity, unless he took the steps required by law to secure his proportion of the proceeds.

In referring to this view, Pont well adds that now that the law of mortgages is founded on the principle of publicity, for a greater reason than formerly must it be said that a mortgage creditor who acquires the mortgaged property preserves his mortgage on it *until he has purged it* only by inscriptions made and renewed according to law.

How completely our conclusion harmonizes with these views is obvious when it is considered that under the ancient and modern French law the purchaser's rights were not fixed by an ordinary adjudication, he being compelled by the one, in order to secure his claim, to oppose his right to the fund produced by his bid, and by the other to resort to the procedure of purgation. In other words, under both systems the existence of a final judicial adjudication was a test as to the necessity of reinscription.

This idea is clearly conveyed by Pont, no. 1062, where he says: "The effect of the mortgage being produced, the necessity of renewing the inscription *ceases only at the time of the final adjudication* or of the offer authorized by article 2173." Troplong, Hypo. no. 726, *bis*, quoted by counsel, and at nos. 726 and 720, not quoted, holds the same doctrine.

namely, that as the third possessor, under the system of purgation, has only a precarious tenure, being liable to eviction by the other creditors, "*he must until he has purged the property according to law* reinscribe his mortgage *up to the time of adjudication* in order to *preserve it from* peremption." Thus the writers upon whose opinion plaintiffs' counsel rely to sustain their position directly and in terms refute it. Nor is the jurisprudence of France, which is relied on, any more favorable to their proposition. In the cases cited, Dupre vs. Tongievis, Cassation, February 5, 1828, Journal du Palais, vol. 21, p. 1133, and Billouch vs. Lambert, (Samson) Cassation, May 1, 1828, Journal du Palais for 1828, 1428, the doctrine held is that the reinscription is required *in default of purging*, according to law. In fact, the synopsis of the last case expressly says "that the third possessor must, *if he does not fulfill the formalities of purging, renew the inscription in order to preserve his hypothecary rank.*" The very cases, then, which are quoted destroy the doctrine they are cited to establish, *a forced sale under our law is a purgation.*

Even in France, where the system of purgation exists, an overwhelming line of authority teaches that where there has been a final adjudication in its nature dispensing with purgation reinscription ceases to be necessary. In Bonvait vs. Macon, J. P. vol. 22, p. 889, it was held by the Royal Court of Grenoble that the hypothecary inscription has attained its object by the final adjudication of the mortgaged immovable, and that, in consequence, it is not necessary, to avoid losing priority, to renew the inscription, the ten years of which only end after the final adjudication of the mortgaged property; and in the case of Enregistrement and Demailly vs. Duretz, July 7, 1829, p. 1204, Journal du Palais, 22, it was held by the Court of Cassation "that the mortgage creditor who becomes the adjudicatee of the immovable encumbered by his mortgage is not obliged, in order to preserve his hypothecary rank, to renew his inscription within ten years from its date, and that the recording has produced its whole effect from the day that the judgment of final adjudication of the mortgaged property has become irrevocable; and see numerous cases quoted in note to this decision; and, also, Paris, August 21, 1862; J. P. for 1863, p. 621; Bordeaux, November 19, 1868; J. P. for 1869, p. 578; Paris, March 24, 1860; J. P. for 1860, p. 922.

Our conclusion, then, is, that the necessity for reinscription in order to preserve the rank of Montegut's mortgage did not exist; that if we were to annul the tax sale by restitution, the entire proceeds of a new sale would be attributable to Montegut, whose mortgage largely exceeds the value of the property; that, hence, the plaintiff, whose cause of action depends upon injury to his rights, is without reason of

complaint, and can not invoke the aid of courts to undo that which judicial machinery would immediately restore.

It seems there was a tract of land in rear of the plantation which did not pass to Montegut by the tax sale, and we do not, therefore, consider that it is covered by the decree we shall render.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be reversed, and, proceeding to render such judgment as should have been pronounced below, it is decreed that there be judgment in favor of Lucien Montegut and against plaintiffs recognizing the property included in the tax sale herein above referred to as the property of Lucien Montegut, free from the mortgage asserted by plaintiffs. The costs of both courts to be paid by plaintiffs.

The parties to this cause have by written consent on application for rehearing asked a modification of the decree previously rendered, in order to correct an oversight as to the parcel of land not included in the tax sale. We grant the rehearing, therefore, in order to enable us to modify our decree.

ON REHEARING.

It is ordered that our former decree be set aside, and it is ordered that the judgment below be reversed in so far as it decreed the property covered by the tax sale to be stricken with plaintiffs' mortgage.

It is further ordered that there be judgment in favor of Lucien Montegut and against plaintiff, recognizing the property included in the tax sale as the property of said Montegut, free from the mortgage asserted by plaintiff. That as regards the double concession, there be judgment in favor of the plaintiff and against Lucien Montegut, condemning said Montegut to surrender said double concession, measuring about seventy-nine superficial acres, in plaintiffs' petition described, and not included in the tax sale.

It is further ordered that the costs below be paid by Montegut, those of the appeal by the plaintiff.

No. 7150.

OSCAR CHOPIN VS. J. N. CLARK. ALEXANDER COUNTY BANK, INTERVENOR.

The rights of a consignee, on the goods shipped to him, who has refused to accept the consignment, and who attaches the goods as an ordinary creditor, are subordinate to the rights of an intervenor who has advanced on the goods, and holds as the transferree of the consignor, the bill of lading of the goods. The intervenor in such a case has a right of pledge on the goods.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Thos. J. Semmes for plaintiff and appellant.

Carleton Hunt for intervenor and appellee.

The opinion of the court was delivered by

SPENCER, J. Oscar Chopin, of New Orleans, was a commission merchant, doing business in said city. J. N. Clark was a customer, owing Chopin a balance of more than $1000. In May, 1877, Clark advised Chopin, by letter, of his having delivered on the wharfboat at Cairo, Ill., 1098 sacks corn, with instructions to ship to him. Clark took from the wharfboat a receipt for 1098 sacks corn, "to be shipped to Oscar Chopin, New Orleans." This receipt bears date May 13th, 1877.

On the next day, May 14th, the corn was shipped to Oscar Chopin "for account of J. N. Clark," as shown by the bills lading.

On same day Clark discounted at the Alexander County Bank his draft at ten days on Chopin for $1350, and delivered to the bank the wharfboat receipt and one of the bills of lading, to secure the same The draft, with the receipt and bill annexed, was forwarded to New Orleans, and protested for non-acceptance on the 19th May, 1877.

On same day, Chopin, who had refused to accept the consignment, sued out an attachment against Clark, and seized the 1098 sacks of corn to pay the balance of account due him.

The Alexander County Bank soon after intervened, and claimed the corn, or, rather, its proceeds (it having been sold), as pledgee and as holder and possessor, by virtue of the transfer of the receipt and bill of lading.

There was judgment below in favor of intervenor, and plaintiff appeals.

There is no dispute about the facts. The question is, was the corn liable to seizure on 19th May, by the creditors of Clark? This depends upon the question, "In whom was legal title and possession vested on that day?"

We are dispensed from an investigation of the question as to whether the bills of lading for Chopin were forwarded *before or after* the delivery thereof to the bank; for as Chopin refused the consignment,

he never had the possession. Where the consignee rejects the consignment, "the property remains in the hands of the carrier as the property of the consignor, or any person deriving title from the consignor." National Bank of Green Bay vs. Dearborn, 115 Mass. p. 219.

In other words, the forwarding of the bills of lading to the consignee vests the possession in him only upon condition that he accept the consignment.

Therefore the title and possession were on the 19th May either in Clark, the consignor, or the bank, as his transferree.

The delivery of the receipt and bill of lading on the 14th May vested the title and possession in the bank, which thereby acquired a pledge upon the corn to secure the draft. We understand that there is no dispute as to the sufficiency of a verbal transfer of the receipt and bill to the bank.

The plaintiff's proposition, therefore, and upon which he rests his case, that the stipulation in the receipt of the wharfboat that the corn received was "to be shipped to Chopin," placed the corn at the latter's disposal, is certainly not maintainable when Chopin rejected the consignment. There can be no doubt that if Chopin had accepted the consignment his possession would have related back to the day the bills "were deposited in the mail or given to the carrier for transmission." Sec. 3, Act 66 of 1874. But he did not accept; he rejected the consignment, and brings this suit as an ordinary creditor, by attachment, after intervenor's rights had vested.

The court *a qua* properly held that his attachment was subordinate to the rights of intervenor, and the judgment to that effect is affirmed with costs.

No. 7513.

STATE VS. JEFF DENNISON ALIAS JEFF DENIS.

Where a prisoner was indicted and tried for murder, and the jury found him guilty of manslaughter, he can not, on a new trial obtained by him, be tried again for the crime of murder. The obtention by the accused of a new trial as to the verdict of manslaughter can not be considered as a waiver of the right to the plea of *autrefois acquit, quoad* the charge of murder.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker*, J.

H. N. Ogden, Attorney General, for the State.

R. King Cutler and *A. E. Billings*, for defendant.

The opinion of the court was delivered by

WHITE, J. The defendant was indicted for murder by the grand jury of the parish of Jefferson. The issue made by the indictment was

tried within the jurisdiction where the crime was committed—resulting in a mistrial. On application of the State the venue was changed to the parish of Orleans, where the prisoner was found guilty of manslaughter and sentenced to hard labor in the penitentiary. From this verdict and sentence an appeal was prosecuted and the verdict was set aside and the sentence annulled, on the ground that the record did not disclose the arraignment and plea of the prisoner. Opinion Book No. 49, p. 401.

The accused was again tried, convicted of manslaughter and sentenced to hard labor, the appeal from this last verdict and sentence being the matter now before us. The record is full of bills of exception, which we will not notice in detail, as our opinion on one of them disposes of the whole case. Before going to trial, or before the impaneling of the trial jury, the defendant filed a plea of *autrefois acquit* as to the charge of murder, predicated on his previous conviction of manslaughter under the same indictment, which was overruled by the Court on the ground, as stated in the bill of exceptions, "that the defendant was now in the same position as he was before trial, and that he would now be tried upon said indictment for the crime of murder." This ruling was erroneous. State vs. Desmond, 5 A. 398; State vs. Chandler, 5 A. 489; State vs. Byrd, 31 A. 422. The doctrine thus upheld by this court is supported by the greatest weight of authority. Wharton, secs. 550, 563; Bishop, Crim. Law, sec. 849; 30 Wis. 216; 42 Indiana, 420; 4 California, 376; 6 Hum. (Tenn.), 410; 54 Ill., 325; 11 Iowa, 350.

The fact that the previous verdict of manslaughter was set aside on the ground that the record did not disclose that the prisoner had been arraigned, does not take the case out of the rule. The effect of the verdict and sentence, as far as the prisoner was concerned, was to acquit him of the charge of murder, and this effect was removed beyond the control of the State, and if the verdict had stood unquestioned by the nonaction of the accused, it would have furnished an effectual bar to a further prosecution for murder. This being unquestionably true, the obtention by the accused of a new trial, as to the verdict of manslaughter, can not be considered as a waiver of the right to the plea of *autrefois acquit quoad* the charge of murder. "The waiving," says Bishop, "of a constitutional right, implied by the making of an application for a new trial, is not construed to extend beyond the precise thing concerning which the relief is sought. If, therefore, the verdict find the prisoner * * * * * guilty of manslaughter and not guilty of murder, and a new trial is granted him, he can not be convicted on the second trial of the matter of which he was acquitted on the first." Bishop, Criminal Law, sec. 849.

This being the case, there was error in ruling the prisoner to trial on the charge of murder, and, although he was only convicted of manslaughter, the erroneous ruling may have been seriously to his prejudice. State vs. Tweedy, 11 Iowa, 350 ; 29 Mo. 32.

The verdict and sentence are reversed and the case remanded to be tried on the charge of manslaughter.

No. 7519.

THE STATE VS. SANDY MARTIN.

On the trial of an accused for carrying a pistol concealed on his person, evidence to show that the pistol belonged to another, that the owner placed it in the hands of the accused merely to get cartridges for it, and that the accused owned no pistol, and had never been known to carry one, is not admissible

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa, *Duncan*, J.

H. N. Ogden, Attorney General, for the State.

Jas. H. Muse and *M. A. Strickland* for defendant.

The opinion of the court was delivered by

DEBLANC, J. Defendant was indicted for having carried concealed, on or about his person, a pistol. He was found guilty, sentenced, and has appealed.

It appears, by a bill of exception, that—on his trial—he attempted to prove that the pistol had been placed in his hands, by the owner, for the sole purpose of procuring cartridges that would fit it, and that he—the accused—had no pistol and had never been known to carry one, either concealed or otherwise, before that day.

The district attorney objected to the evidence sought to be elicited, on the ground that, in this case, the sole issue raised by the indictment "was as to the concealment of the weapon, and that no evidence could properly be admitted to negative a criminal intent."

The court sustained the objection and correctly refused to admit the evidence.

To constitute the crime charged, it suffices that a dangerous weapon be carried concealed on or about the person, and it matters not that it be so carried with or without any actual intent.

Revised Statutes, Sect. 932.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 7487.

STATE EX REL. J. P. BECKER VS. JUDGE OF THE SIXTH DISTRICT COURT.

A suspensive appeal lies from an order of a lower court refusing to grant a preliminary injunction, and the judge of the court may be compelled by mandamus to grant such an appeal.

APPLICATION for writs of mandamus and prohibition.

F. Michinard for relator.

Sam. P. Blanc for respondent.

The opinion of the court was delivered by

WHITE, J. The relator asks for writs of prohibition and mandamus to direct the allowance of a suspensive appeal from an order refusing to issue a preliminary injunction. He presented a petition asking a preliminary injunction. The Court not feeling satisfied, from the face of the papers, that the prayer should be granted, ordered the defendant to show cause, on a day fixed, why the injunction as prayed for should not issue, and directed that pending the hearing proceedings be stayed. After appearance by the counsel and an argument as to the right to the preliminary writ, the court refused to grant it. The plaintiff applied for a suspensive appeal, and on its being refused our jurisdiction was invoked. The judge of the court below, in his answer says, he expressed his willingness to grant a devolutive appeal, but seems to have refused an appeal suspensive in its nature because of a belief that an appeal of such a character would have continued in force the order by him temporarily granted staying proceedings until the hearing, as to whether or not he would grant the prayed-for injunction; thus practically granting an injunction without bond, for no bond had been required for the temporary order. In other words, he refused the suspensive appeal, because of what he conceived to be a possible wrong to result from its allowance. In this we think he erred. The appeal was asked from the refusal to grant the preliminary injunction. Whether the appeal when granted would continue in force a temporary order issued under the circumstances disclosed by the record, is a matter upon which we need express no opinion, as the question before us is simply as to the right of appeal from an order refusing an injunction, and not what such an appeal may suspend, if allowed.

That an appeal lies from a refusal to grant a preliminary injunction, is no longer an open question. State ex rel. Tricou vs. Lewis, 7 M. 459; 28 A. 902; 29 A. 795. The right to appeal, being therefore undoubted, its nature did not depend on the discretion of the lower judge, but on the appeal having been applied for within the time and in compliance with the forms prescribed by law. The writs of mandamus and prohibition are made peremptory.

No. 7649.

THE STATE VS. THOS. TAYLOR.

A person may be legally prosecuted and condemned for murder under an indictment found within one year from the *death* of the deceased. The prescription of one year, applicable to such cases, begins to run from the death of the deceased and not from the infliction of the wound resulting in the death, or the date of the arrest of the accused.

APPEAL from the Fourth Judicial District Court, parish of St. James. *Duffel*, J.

H. N. Ogden, Attorney General, for the State.

James Legendre and *L. Gaudet* for defendant.

The opinion of the court was delivered by

DEBLANC, J. On the 2d of March, 1878, the defendant—Thomas Taylor—shot and wounded one Loyd Payne, who—on the 15th of April of that year—died from the effects of the inflicted wound.

Taylor was arrested on the 4th of March, two days after he had shot and wounded Payne, and—on the 9th of May 1878—a true bill for murder was found against him. On the 17th of that month, the district attorney discontinued, by a *nolle prosequi*, the prosecution commenced under the first indictment.

On the 5th of March, 1879—one year and three days after Payne had been shot and wounded, and less than one year from the date of his death—another indictment was filed against Taylor, and—under that indictment—he was tried, convicted of murder and sentenced. He appealed, the sentence passed upon him was reversed, the case remanded, and—on the new trial—he was found guilty of manslaughter, and condemned to imprisonment in the State Penitentiary, for the term of twenty years.

He has again appealed, and—to obtain the reversal of the second verdict and sentence—he relies on the fact that one year intervened between the commission of the offence, his arrest, and the filing of the indictment under which he was tried.

That defence is based on section 986 of the Revised Statutes, which provides:

"That no person shall be tried or punished for any offense, wilful murder, arson, robbery, forgery and counterfeiting excepted, unless the indictment or presentment for the same shall be found or exhibited within one year next after the offense *shall have been made known* to a public officer having the power to direct the investigation or prosecution."

The first warrant under which Taylor was arrested, bears the date of the 4th of March 1878, and merely recites that he *had shot and*

wounded Payne; and it was on the 17th of May, more than one month after the death of Payne, that the district attorney made an affidavit charging that he *had been killed and murdered* by Taylor.

Had defendant been indicted between the 2d of March, when he shot and wounded Payne, and the 15th of April, when Payne died, he could have been indicted but for *an attempt* to murder or to kill.

It was on, and from the 15th of April 1878, not before, that a public officer could have been informed that defendant had killed Payne, and it was at and from that date that arose the right to prosecute him for murder or manslaughter. He was reindicted on the 5th of March 1879, within one year from the day on and from which he could have been prosecuted for manslaughter, and his defence is not sustained by either the facts or the law.

In "State vs. Wallman," we said: that the death of the victim struck completes the crime of murder, or of manslaughter, but that it alone did not constitute the crime; that, unless death ensues, the felony is not murder or manslaughter, but another, a lesser offence.

How any part of this opinion can avail defendant, we are at a loss to imagine. Payne was shot and wounded by him on the 2d of March. He died on the 15th of April, and his death completed a crime, which—until it occurred—was not a manslaughter, and which—before that date—could not, *as such*, have been *made known to*, investigated, or prosecuted by a public officer.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 7461.

ST. CHARLES-STREET R. R. CO. VS. BOARD OF ASSESSORS.

A transposition of figures from one column of the assessment rolls to another column, made by one of the assessors without the authority of the Board of Assessors, and made after the rolls were closed, is of no effect, and in construing the rolls will be held as not having been done.

An assessment of the capital stock of a corporation at its par value, when the evidence shows it has a higher market value, is a valid assessment.

The law which makes the *market* value of the evidences of rights to the capital of a corporation, as a criterion of value, for purposes of taxation, of its capital, or capital stock, is not unconstitutional.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

Breaux, Fenner & Hall for plaintiffs and appellants.

Sam. P. Blanc for defendants an l appellees.

The opinion of the court was delivered by

WHITE, J. The plaintiff railroad averring that it was erroneously

assessed for $422,000, brings this mandamus proceeding to have the assessment stricken from the rolls. The lower court maintained the assessment. Plaintiff appeals.

Before examining the issue as to validity of the assessment, it became necessary to determine a question of form of assessment.

When the assessment rolls were exposed, as required by law, the plaintiff was assessed under the head of "Capital in business or money at interest for $422,000." After the figures, which were in a column headed as above, was written the word stock. The plaintiff, while the rolls were exposed, complained of this assessment as thus made, and applied to have it stricken off; and the petition for mandamus which instituted this cause describes the assessment in like manner. When the cause came to be tried it was discovered that the figures $422,000 had been transferred to a column headed, "Stocks in vessels and corporations." The proof indubitably establishes that the transposition was made by one of the assessors after the rolls were closed, without the authority or knowledge of the Board of Assessors, and was, of course, therefore in legal contemplation not done at all. For we need hardly refer to the terms of the statute making the rolls as closed final. We shall, therefore, treat the assessment as it stood on the closed rolls; that is, as in the column therein headed, "Capital in business or money at interest," and as placed therein as $422,000, with the word stock immediately following these figures. The law as to this assessment is as follows, to be found in section 3, of act no. 9 extra session of 1878 acts of 1878, p. 234:

"In the first column they shall enter the name of the company liable to taxation on its capital, or otherwise; in the second, the quality and description of the real estate owned or represented by the company, and situated in their parish; in the third column, the actual value estimated as in other cases; in the fourth column, its capital stock and its value, to be ascertained by the assessor from the market price of the stock, or in any other manner." * * *

The proof is that the capital stock of the company is six hundred thousand dollars, and that its market value is *above its par value.* In making the assessment, the assessors took the capital stock at its par value, although it was above par in the market, and deducted from it the property otherwise assessed; thus obtaining the sum complained of. We think that the assessment was valid. The complaint against it is thus stated in the pleadings:

"Your petitioner avers that the original amount of its capital stock as fixed by charter and amendments was $600,000; and that, assuming that all of said stock was taken by subscribers before any of the proceeds of said subscription were invested in its present property, there

might have been a time when petitioner had a capital of $600,000. But your petitioner avers that all of the proceeds of said subscription, viz., all of its capital, has many years since been invested in the property above described as correctly assessed; and that it neither owns nor possesses any property beyond the same." In other words, the proposition is, my nominal capital is $600,000, the evidence of it in the hands of my stockholders is worth more than par, therefore equals or rather exceeds $600,000; but inasmuch as I have, as the result of that capital, a sum of tangible property equal to only, say $100,000, my capital stock is only to be considered as worth that sum. Were we to maintain the proposition, we would declare that the value of the evidences of a right exceeded the value of the right evidenced, a contradiction in terms. We think it an adequate answer to say that the law has made the *market value* of the evidences of rights to the capital as the criterion of value of the capital or capital stock of the company, and we see nothing unconstitutional in such a provision.

This case in many respects is assimilated to that of the Gas-Light Company vs. Board of Assessors, and for the above reasons, and those in that case expressed, we think the judgment of the lower court correct; it is therefore affirmed with costs.

No. 7622.

MARGARET SABALOT VS. CHAS. POPULUS, TESTAMENTARY EXECUTOR.

The fact that a surviving widow had been the concubine of her deceased husband does not impair her claim to the sum allowed by law to widows in necessitous circumstances.

A marriage otherwise valid is not affected by the fact that no license was obtained.

Where a couple have lived together as man and wife until the husband's death, the validity of the marriage can not be impugned on the ground that he was out of his mind when the marriage ceremony was performed.

The claim of a creditor in virtue of a conventional mortgage executed after the passage of the homestead law, is inferior to widow's claim under that law. The fact that the money lent by the creditor, and secured by the mortgage, was used to pay the taxes on the property, can not affect the priority of the widow's claim.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

Chas. Louque for plaintiff and appellant.

Guy Duplantier for third opponent, appellee.

The opinion of the court was delivered by

DEBLANC, J. In 1876, Zepherin Baptiste was married to Josephine M. Carderonne. He died in 1878, and—according to the evidence—his wife did not then possess—in her own right—any property, and—up to trial of this case—was absolutely penniless.

He had—before his marriage—in 1873 and 1875—borrowed, from Margaret Sabalot, six hundred and fifty dollars, and secured—by a conventional mortgage—the re-imbursement of said sum. The property thus mortgaged was, after his death, sold to satisfy Mrs. Sabalot's claim against him, and Mrs. Zepherin Baptiste contends that—out of the proceeds of that sale—she should be allowed, by preference, the amount allowed by law to widows in necessitous circumstances.

Her demand, which was granted by the lower court, is contested by the mortgage creditor, on the grounds:

1: "That she is not in destitute circumstances." That fact was fully established and stands uncontradicted.

2: "That she was the concubine of Baptiste." She had been his concubine, but became his wife eighteen months before he died; and, as held by ourselves, could not—on account of the irregularity of her ante-nuptial life—be deprived of the bounty which she seeks to obtain.

29 A. 412.

3: "That the celebration of her marriage with Baptiste was not preceded by the license which the law requires." Were it so, the law relied upon is merely directory to those who are empowered to celebrate marriages, and its non-observance can not—of itself—affect their validity, when—as in this case—they are otherwise duly solemnized and contracted.

C. C. 104, 111 (113); 6 L. 470; 20 A. 97; 3 L. 33; 2 A. 944; 7 A. 253.

4: "That when the pretended marriage took place, Baptiste was sick, out of his mind, and the ceremony was performed without his knowledge or consent." He was sick, but got well, and until his death continued to cohabit with Josephine M. Carderonne, freely and without constraint; and—under these circumstances—neither he, if alive, his wife, or any third party, could successfully urge—on this ground—the nullity of their marriage.

C. C. 110 (112); 111 (113).

5: "That plaintiff's mortgage was given by the deceased before his marriage, and to procure money which he used to pay the taxes due on the hypothecated property." The homestead law was in force when that mortgage was granted, and it is not alone the debtor's obligation, but it is also *the creditor's right* which must be measured by that law, and we are bound to presume that—when she made the loan—Mrs. Sabalot knew what risks she was incurring. Whether she did or did not know, her right is inferior in rank to that of the widow.

27 A. 276; 29 A. 412; 1 R. 86.

It matters not that the borrowed money was used to satisfy taxes levied on the mortgaged property. Mrs. Sabalot was not subrogated to the privilege securing the payment of those taxes; and, though they

may have been paid out of the funds borrowed from her, that privilege is now extinguished, and can not be revived, added to the mortgage, or give it a retroactive effect.

In "Lear vs. Heffner, etc.," the right to the homestead was disputed on the ground that the creditor's judgment was for money furnished to pay the price of the property, and this court said: "The fact that the money loaned was used in paying the instalments of the price, did not make the loan the price. The lender was not the vendee, nor were her rights derived from the vendor, in whose favor the law makes the invoked exception; and her construction of the law would give to a debt, which—from its nature—is not secured by any privilege, a superiority over all privileges and mortgages. This is not admissible."

28 A. 829.

As to the predicted effects of a decree confirming that of the lower court, we can but say that our mission is not to create, but to enforce rights, regardless of what may or may not be the result of the enforcement.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

No. 7527.

HENRIETTE HENRI VS. FRANCIS FRANCINCUES ET AL.

This Court is without jurisdiction where the amount involved is less than $500.

Where the testimony in the lower court was not reduced to writing, and no statement of facts was agreed on by the counsel of the parties, and the judge who tried the case could, on being applied to, give a vague and general impression only of the testimony, the appeal must be dismissed.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

A. & W. Voorhies for plaintiff and appellant.

Frank D. Chretien and *Octave Morel* for defendants and appellees.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The dismissal of this appeal is moved on two grounds;

1. want of jurisdiction *ratione materiæ*.

2. absence of the oral testimony adduced on the trial.

Either is good. The amount involved is less than five hundred dollars. No portion of the oral testimony was taken in writing. The counsel for both parties were unable to agree on a statement of facts, and the judge, upon being required to do so, was unable after the lapse of

many weeks after the trial to retain more than a vague and general impression of the testimony. The consequence is that the record does not contain the evidence upon which the judgment is founded, and we are thus unable to review it.

This has often been held to be good ground of dismissal. Boller v. Day, 16 La. 251. Roberts v. Benton, 1 Rob. 100. Clark v. Laidlaw, 4 Rob. 380. Thayer v. Littlefield, 5 Rob. 152.

Appeal dismissed.

ON APPLICATION FOR REHEARING.

The counsel for the appellant complains,

1. that we have overlooked arts. 601—3 of the Code of Practice.

Those were the articles we were construing.

2. that we have overruled the cases, to which we were referred by him, and cited as "6 La. 129, 7 La. 245, and 7 M. 121."

The first is Bowman v. James, where the testimony was taken down, not by the clerk but by some other person, and without the request of either party to the suit, which seems to have been considered necessary, but notwithstanding the testimony was in the record, the court dismissed the appeal.

In the second case, McDaniell v. Insall, the evidence was not taken down, and the judge could not remember it, and the case was remanded.

The third case, Lynch v. Postlethwaite, has nothing whatever upon the subject.

3. that the cases referred to by us are not in point.

In the first case we referred to, some of the testimony was lost after it had been taken in writing, and the court said, there was nothing to shew that the clerk was required to take down the testimony, and that a *certiorari* would be useless, and refused the motion of the appellant to remand the case. Boller v. Day, 16 La. 251.

The second of our cited cases decides that when the certificate of the clerk shews that parol testimony, taken on the trial but not reduced to writing, is not to be found in the record, and there is no statement of facts, the appeal must be dismissed. Roberts v. Benton, 1 Rob. 100.

In the third case, a *certiorari* had been issued and the return shewed the missing testimony had not been taken down, and a dismissal was the consequence. Clark v. Laidlaw, 4 Rob. 380.

The last case referred to by us rules, that where part of the documentary evidence offered was not in the record and could not be found when the transcript was made, and there is no evidence that it has been discovered since, the appeal must be dismissed. Thayer v. Littlefield, 5 Rob. 152.

So there is one case, McDaniell v. Insall, that supports the appellant, which was evidently overruled by the others, and the same court that decided it had ruled, "where the record exhibits no statement of facts, and the certificate of the clerk shews that the testimony taken in open court, was not reduced to writing, under these circumstances it is impossible for the appellate court to examine and decide the case on its merits," and the appeal was dismissed. Thomasson v. Baum, 6 La. 123.

The rehearing is refused.

No. 7610.

THEODORE LAUSSADE VS. JULES MAURY ET AL.

A party who takes a suspensive appeal, and fails to prosecute it, thereby forfeits his right to a devolutive appeal.

APPEAL from the Second Judicial District Court, parish of Plaquemines. *Pardee*, J.

J. S. & J. T. Whitaker for plaintiff and appellant.

E. H. McCaleb for defendants and appellees.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. Judgment having been rendered against the plaintiff on March 28, 1879, he moved for a suspensive appeal, which was granted returnable on 3d Monday of the following month, and he gave bond therefor on April 7th. This appeal was not prosecuted.

On July 23d following the plaintiff petitioned for a devolutive appeal, which was also granted, and bond being given, this transcript was filed Nov. 3d.

The defendants move to dismiss for failure to prosecute the previous appeal.

The case is identical with Ducourneau v. Levistones, 4 Annual 30, and Collins v, Monticou, 9 Annual, 39. The imperative requirement of the Code of Practice is, that an appeal shall be considered as abandoned if the appellant does not file the transcript seasonably, and he shall not be permitted to renew it afterwards. Code Prac. art. 594.

Appeal dismissed.

No. 7452.

GEORGE W. REINE VS. THERENCE JACK. A. GARNIER, THIRD OPPONENT.

The holder of a first mortgage note has a right to proceed by motion, as third opponent in an executory proceeding instituted by the holder of another first mortgage note, secured by the same mortgage, to have the proceeds of the sale applied to the payment of his note.

The dismissal of a rule taken by a mortgage creditor in one court, to distribute the proceeds of the mortgage property which had been seized and sold under the process of another court, will not estop him from proceeding in the latter court to effect the distribution, the dismissal of the rule not having the force of *res adjudicata*.

A second mortgage creditor who buys first mortgage notes is thereby legally subrogated.

The *bona fide* transferrees of concurrent mortgage notes are entitled to a ratable distribution of the proceeds of the mortgage property, and the fact that one of the transferrees obtained his mortgage note after its maturity, does not impair his right to a ratable distribution.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Alcée J. Kerr for plaintiff and appellant.

Chas. Louque for third opponent and appellee.

The opinion of the court was delivered by

WHITE, J. On the twenty-fourth of March, 1874, W. E. F. St. Ferol sold to Thérence Jack certain real estate in this city; the credit price being evidenced by four notes of the purchaser.

On the sixteenth November, 1878, proceedings were instituted on two of the purchaser's notes by G. W. Reine, and in accordance with the prayer of the petition, which was filed in the Fifth District Court, executory process issued. On the same day like proceedings on the other two notes were commenced in the Fourth District Court at the instance of A. Garnier.

The defendant enjoined the proceedings in the Fourth District Court. Pending the decision of the injunction suit, the property was seized and sold by the sheriff, under the writ issued from the Fifth District Court, under which the first seizure had been made.

Garnier took a rule in the Fourth District Court to distribute the proceeds of the sale. The rule was excepted to on the ground, among others, of want of jurisdiction *ratione materiæ*. The exceptions were maintained and the rule was dismissed. Thereafter, the injunction was dissolved and the suit in which it issued was decided in favor of the defendant therein. Garnier then, by motion, in the Fifth District Court, sought as a third opponent to have the proceeds of the sale applied to the two notes held by him. Reine, the seizing creditor, excepted to the proceeding by motion. The issue was tried, and the lower court, con-

cluding that the claim of the seizing creditor was concurrent with that of the third opponent, directed the ratable distribution of the fund. The seizing creditor appealed, and the third opponent answers asking that his priority be recognized. We shall notice first the grounds relied on by the appellant for reversing the judgment, and then those urged by the appellees for its amendment.

1. The third opposition was correctly taken by motion. C. P. 398

2. The judgment on the rule in the Fifth District Court was not *res adjudicata;* it simply dismissed the rule by maintaining the exception; it was at best a nonsuit.

3. The claimed payment of the notes of the third opponent has not been shown; on the contrary, we think the proof adequately establishes that when they were obtained by the third opponent they were bought by him for his account, and that at the time he used his money to acquire the notes he was a second mortgage creditor, and, therefore legally subrogated. C. C. 2161.

The fact that the person holding a series of mortgage notes after transferring some of them can not be allowed, in the event of the inadequacy of the proceeds, to compete in the distribution with the person holding the transferred notes, is not the measure of the rights of transferrees, *inter sese.* Adams vs. Leat, 3 A. 144; Perot vs. Lavasseur, 21 A. 529. Nor do we think the fact that one of the holders acquired after maturity makes his position an exceptional one, as we consider to have been correctly decided in Perot vs. Lavasseur. The equitable or quasi equitable estoppel applied to one who had transferred in Salzman vs. Creditors, 2. R. 243, is in no sense an equity against the note in the hands of a transferree; nor is such transferree subject as the holder of the note to the estoppel, which, as applied in the Salzman and other cases, is not a defense to the note, but simply an estoppel, good against a transferrer when he seeks to compete with his transferree, but not applicable to transferrees between themselves.

Judgment affirmed with costs.

No. 7091.

THE STATE VS. GEORGE CARROLL.

The conversations of an accused, on trial for murder, after the alleged killing, with a person jointly indicted for the murder, are not admissible in evidence when the indictment did not charge conspiracy.

This court can not express an opinion as to the weight and nature of testimony in a criminal case; more especially when the testimony is not before it.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Duncan,* J.

James M. Wright, District Attorney, and *James H. Muse* for the State.

E. P. & S. D. Ellis for defendant.

The opinion of the court was delivered by

WHITE, J. George Carroll was indicted, along with Melford Short and Peter Daggs, for the murder of his wife, Sarah Carroll. Melford Short applied for and obtained a severance, and a *nolle prosequi* was entered as to Daggs. Carroll was tried and found guilty, and sentenced to suffer the death penalty; he appeals.

The record contains an assignment of several grounds of error, as, also, several bills of exception. We will notice only one of the latter, as the opinion we have formed on it is conclusive.

The State offered the witness, Peter Daggs, in the language of the bill of exceptions, "to prove conversations with Melford Short, and also, the whereabouts of Melford Short, both after the alleged killing of deceased; which offering was objected to by counsel for the accused, upon the grounds that Melford Short being an accomplice and jointly indicted, and no conspiracy having been alleged in the indictment, the declaration of said Short made to witness, Daggs, can not be used as evidence against the accused, which objection the court overruled, and permitted the witness to testify." It is too elementary to require reasoning, that if the indictment did not charge a conspiracy the conversations were not admissible.

It is equally clear that if the conspiracy was charged the declarations of one of the co-conspirators after the accomplishment of the crime for which the conspiracy was formed ought not to have been received as evidence. State vs. Butler Jackson, 29 A. 354.

It is urged on behalf of the State that the materiality of the admitted conversations is not shown by the bill of exceptions. Our jurisdiction extending only to the law; and the bill, as signed by the court, giving no indication of what the conversations were, we can not presume that irrelevant testimony was illegally allowed to go to the jury despite the prisoner's objections. We can not express an opinion as to the weight or nature of testimony not before us, and not, if it were, within the range of our judicial vision, which is limited by the Constitution.

The verdict and sentence are avoided and reversed, and the case remanded for a new trial.

No. 7607.

M. J. McAdam vs. H. N. Soria. John S. Rainey, Intervenor.

Where an alleged sale is a mere simulation, it may be treated as a nullity, and the thing transferred by the pretended sale may be directly seized or attached by a creditor of the vendor. But where there is a real sale, however fraudulent, the creditor can not seize the property in the possession of the purchaser, but must resort to the revocatory action.

The failure to object to the admission of evidence bearing on an issue *not* made by the pleadings will not authorize the adjudication of that issue, when the evidence admitted is applicable to the issue made by the pleadings.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

G. L. Hall for plaintiff and appellee.

Percy Roberts for intervenor and appellant.

The opinion of the court was delivered by

Marr, J. McAdam having obtained judgment against Soria, caused execution to issue, and the sheriff seized certain carts and wagons as the property of Soria.

Rainey, by way of intervention and third opposition, claimed to be the owner of these movables, alleging that they had been sold and delivered to him by Soria, for a valuable consideration, before the seizure. On affidavit and bond he obtained an injunction against further proceedings under the seizure.

McAdam answered by general denial: and he alleged that intervenor was not the true and lawful owner: that the alleged sale to him was fraudulent and simulated, and not real and made in good faith; and that it was contrived between Soria and intervenor to shield and protect the property of Soria from the pursuit of his creditors.

"Respondent distinctly denies any real sale, or delivery, or consideration as alleged in intervenor's petition."

The judgment of the District Court was in favor of McAdam, dissolving the injunction, and setting aside the sale made by Soria to Rainey, as null and void. The following extract from the opinion of the court presents the questions to be considered on the appeal of Rainey from this judgment:

"The answer raises the issue of simulation very clearly. It contains some of the allegations necessary to a revocatory action, but does not contain all the averments necessary to such an action. It does not aver that Soria was insolvent at the date of the sale, that Rainey knew that Soria was insolvent, that the sale, if carried into execution, would have the effect of defrauding the plaintiff, McAdam. Evidence was introduced, however, to show all of these facts, and there was no objec-

tion made to the admissibility of such evidence. Effect must be given to evidence received without objection, when no prohibitory law intervenes, and where the action brought resembles the one in which the evidence is applicable as closely as the action *en declaration de simulation* resembles the revocatory action.

"The case has been fully tried without objection as a revocatory action, and it would be a vain thing to try the issue over again, in the form of a direct action. *Simulation has not been shown*, but it is clear that the sale to Rainey was in fraud of creditors."

The settled jurisprudence is, that, where the alleged sale is a mere simulation, it may be disregarded, treated as a nullity by the creditor of the seller; and he may seize the property under execution, or attach it for the debt of the seller. But where there is a real sale, however fraudulent, the creditor can not seize the property in the possession of the purchaser, but must resort to the revocatory action. The numerous cases in the Reports establishing this doctrine, proceed upon the plain propositions, that a mere simulation is a nullity, and does not transfer the property; while a real sale, perfected by delivery, although voidable for fraud, divests the title of the seller, and vests the ownership and possession in the purchaser.

A simulation which is not fraudulent because it is not prejudicial to the rights of creditors, can not be attacked by them. There is a manifest distinction between a fraudulent simulation, that is, a pretended contract which is in fraud of the rights of creditors, and a fraudulent sale, which is a real contract. The fraudulent simulation, a mere pretense, without reality, need not be attacked by suit; the sale, a reality though fraudulent, must be set aside by judgment, in an action brought for that purpose. See St. Avid vs. Weimprender, 9 Mart. 649; Richards vs. Nolan, 3 N. S. 336; Barbarin vs. Saucier, 5 N. S. 361; Peet vs. Morgan, 6 N. S. 139; Morton vs. Crosby, 14 La. 426; Cammack vs. Watson, 1 A. 132; Emswiler vs. Burham, 6 A. 716; Bevens vs. Weill, 30 A. 186.

It is obvious that the Judge of the District Court was of opinion that the case made by the pleadings was one of simulation *vel non;* and that the case proven was not a simulation. In these conclusions we fully concur with him. The sale to Rainey was perfected by delivery. The carts and wagons were removed from the store of Soria to a distant cotton press, the place of delivery designated by Rainey; and Rainey executed and delivered to Soria two promissory notes, at three and four months, for the price, in accordance with the terms of sale. One of these notes was discounted in bank on the indorsement of Soria alone; so that the credit of the maker must have been undoubted.

The judge was of opinion, however, that the want of the allegations in the pleadings requisite to the revocatory action, were supplied by the

testimony adduced on the trial, and received without objection. We differ with him in the conclusion that the failure of intervenor to object to the evidence was a consent to try the case as a revocatory action; or that it authorized the judgment appropriate to that action.

As we have already stated, it is only where a simulation is fraudulent, because prejudicial to the rights of creditors, that it can be attacked by them. The same contract can not be treated as a fraudulent simulation and as a fraudulent sale; because it can not be a mere pretense, and at the same time a reality. The testimony to prove a fraudulent sale would be applicable to an alleged fraudulent simulation: that is, it would be necessary, in the one case and in the other, to prove fraud, since, in either case, fraud is the basis of the creditor's right to pursue the property. In Weeks vs. Flower, 9 La. 385, proof of fraud, although objected to, was held to be admissible to show that the contract was simulated, and intended to cover the property from the pursuit of the seizing creditor; and in Emswiler vs. Burham, 6 A. 717, where the same objection was made, the court said: "Fraud may always be proved, in support of the allegation of the simulated transfer of property, by those interested to establish the simulation."

The testimony which would have tended to prove a fraudulent sale, if that had been the issue in this case, was proper and admissible to prove a fraudulent simulation, which actually was the issue. No consent of the intervenor, therefore, to try the case as a revocatory action, can be implied from his failure to object to testimony which was admissible under the pleadings.

The rule, which has been applied to immovables, without exception, is thus stated: Where a person is in possession under a conveyance not void upon its face, the question of fraud can not be inquired into collaterally, by commencing with a seizure; and the complaining creditor must resort to the revocatory action. See Weeks vs. Flower, 9 La. 385; Morton vs. Crosby, 14 La. 426; Kirkland vs. G. L. Bank, 1 A. 300. In the latter case the opinion was expressed, for the first and only time, so we are informed, that this rule is not applicable to movables. It was applied to movables in Peet vs. Morgan, 6 N. S. 139; Taylor vs. Whittemore, 2 Rob. 101; Presas vs. Lanata, 11 Rob. 288; England vs. Commercial Ins. Co., 16 A. 5; Austin vs. Da Rocha, 23 A. 44; Bass vs. Messick, 30 A. 373; and it was fully recognized in Guidry vs. Lyons, 29 A., in which there was a simulated sale of sugar and molasses, with intent to defraud creditors.

In Danjean vs. Blacketer, 13 A. 595, the pretended sale included movables and immovables; and the property was attached by creditors of the seller. We infer from the opinion of the court that the case

was tried as if the issues of a simulation and of a fraudulent sale had been joined; and the attachment was maintained.

If this case and that in 1 A. 300, are to be understood, the one as excepting movables from the general rule, the other as authorizing the creditor to attack collaterally, by commencing with a seizure, a real though fraudulent sale, they are in conflict with the jurisprudence, otherwise uniform, of more than half a century; and we can not consent to accept them as authoritative. It may seem to be a vain thing to try the issue of fraud over again, in the form of a revocatory action; but we think the only issue which could have been passed upon in this case was that of simulation, the only issue which the creditor has a right to make when he commences with the seizure of the property. Proof of the sale, and of the delivery, and of the payment of the price, in accordance with the terms of the sale, suffices to show a real contract, however fraudulent; and to compel a resort to the revocatory action. Whatever may be our views of the ultimate rights of the parties, we are constrained to declare that the law of Louisiana does not permit the creditor to disregard possession, under a real title, not void upon its face, and to seize the property as if there had been no change of title, and no corresponding change of possession.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed: that the injunction, granted *in limine*, on the intervention and third opposition of John S. Rainey, be reinstated, and be made perpetual without prejudice to the right of Michael J. McAdam to pursue the property in question by the revocatory action which is expressly reserved to him; and that the said Michael J. McAdam, appellee, pay the costs in this court and in the District Court.

Rehearing refused.

No. 7480.

JEAN AUGÉ VS. MICHEL VARIOL. T. LAFON, GARNISHEE.

Where an act of pledge which states the amount of the debt, and the nature of the thing given in pledge, omits to state that the thing was delivered to the pledgee, the testimony of the pledgee that he did receive the thing at the time the act of pledge was executed, given in response to a question put by a creditor of the pledgor who is attakiug the validity of the pledge, is admissible to prove delivery. It is not conceded that an act of pledge need state that the thing pledged was delivered.

The fact that a thing is held in pledge by one creditor, who is empowered to sell the thing at public or private sale, does not prevent other creditors of the pledgor from seizing the thing in the hands of the plegdee and having it sold, subject to the pledgee's claim.

The answer of a garnishee confessing that he had property of the defendant in his hands, but claiming a right of pledge on it, standing unimpeached and uncontradicted, must be received as a whole. It may be disproved, but can not be arbitrarily divided.

A judgment which decides the issue formally raised by the pleadings is not premature because the case is remanded to ascertain the amount due under the judgment.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Albert Voorhies and *A. Pilié* for plaintiff and appellee.

Carleton Hunt for garnishee and appellant.

The opinion of the court was delivered by

DEBLANC, J. In February, 1878, Augé obtained a judgment against Variol, and is now proceeding against Lafon—as garnishee—to compel him to deliver to the sheriff, as belonging to Variol and subject to his judgment, certain effects which Lafon acknowledges to be in his possession, but which he claims to hold under an act of pledge. That act—which is written in the French language—stipulates that "whereas Variol—up to this date—has been unable to pay the one thousand dollars referred to in an instrument under private signature, of the 21st of December, 1874, Lafon *consents to receive*, as a guarantee for the payment of that sum, in ninety days from this date, a lot of hair, at cost price, equal in value to said sum."

"With the privilege to Lafon—if said sum of one thousand dollars be not paid in the ninety days—to sell said lot of hair, if he thinks proper to do so, without legal process, at public or private sale, and for the price it may bring."

Augé's counsel contend that possession is of the essence of a contract of pledge, and that in such a contract, and as regards a corporeal movable, the fact of that possession must be made to appear by the written instrument, and that if it does not so appear, the contract is null and void as to third persons.

"The pawn invests the creditor with the right of causing his debt to be satisfied by privilege and in preference to the other creditors of the debtor, out of the proceeds of the movable, corporeal or incorporeal, which has been thus burdened."

C. C. 3157 (3124).

"But this privilege shall take place against third parties, only in case the pawn is proved by act made either in a public form or under private signature; provided such an act has been recorded in the manner required by law; provided also that, whatever may be the form of the act, it mentions *the amount of the debt*, as well as the *species or nature of the thing given in pledge*."

C. C. 3158 (3125).

As to the pledge of movable property, it may be made by private writing, *accompanied* by actual delivery.

C. C. 3158 (3125).

The act of pledge relied upon by the garnishee, is—in form—that required by the Code. It expressly mentions *the amount of the debt*, and *the nature of the thing* given in pledge; but it does not, in so many words, recite that the thing pledged was delivered to the creditor, and that recital—it is contended—was indispensable to the validity of the contract. The Code merely provides, as to the delivery, that it must accompany the private writing.

There is no doubt that the privilege resulting from the pawn can subsist but when the creditor has been actually put and has remained in possession of the thing pledged—but, here, what is the evidence elicited by one of the interrogatories propounded by Augé to the garnishee? It is that—since the 9th of January, 1875, the lot of hair has been placed in his hands by Variol, and as a pledge, to secure the payment of a claim on which there now remains due, according to said evidence, a balance of at least five hundred and sixty-five dollars.

The rule taken against Lafon is based on that confession, on his acknowledgment that he has in his possession, and holds in pledge, the merchandise which Augé seeks to subject to his judgment; and were it essential—which we do not concede—that the written instrument attesting the pledge of a movable, should contain an express mention of its delivery—that confession, elicited by Augé himself, from which springs and on which alone he has based his action against the garnishee, and which he cannot either divide or curtail, would have supplied the omitted mention.

The words "*I consent to receive*" could have been used but in answer to a previous proposition, and they do express an acceptance of that proposition, which—whatever may have been the terms employed to convey and accept it—was reduced to writing, and accompanied by an actual delivery. That writing contains every one of the mentions required by the Code, and evidences a valid pledge, made in good faith and to secure an honest claim.

Teulet and d'Anvillers hold that, as against third parties, *a pledge* cannot be established by testimonial proof, *alors même que le créancier rapporterait un commencement de preuve par écrit;* but—evidently—they did not refer to such an act as that now before us, and which—though inartificially drawn—mentions the amount of the debt, describes the thing given in pledge, and—moreover—empowers the creditor to sell it for any price, at public or private sale—nor did they refer, as relates to the delivery and possession of the thing pledged, to testimonial proof elic-

ited, and judicial admissions made by the very party assailing the validity of the contract.

It is clear—however—that the pledgee's privilege is not such as to prevent the other creditors of the pledger from seizing the effect securing the former's claim. He could have sold at public or private sale, but he did not sell; and—as said by this court—cannot be allowed to hold, to the exclusion and detriment of the others, that which, it may be, is worth more than the money he has lent on it. "Were it otherwise, the creditor in possession would become, by his own wrong, the proprietor of the pledge—and that in violation of the law which prohibits him from acquiring by such means, and expressly declares that the pledge is given *to secure* the satisfaction of a debt."

C. C. 3133 (3100); 3157 (3124); 2 N. S. 22; 1 N. S. 417; 13 L. 341.

In answer to one of the interrogatories propounded to him, Lafon said that the balance due him by Variol was, then, five hundred and sixty five dollars; and—on the trial—that it was that amount, and more for interest, and also that Variol's indebtedness to him was represented by two notes, which were offered in evidence, but have not been copied in the transcript.

Besides, Lafon himself has shown that—by an agreement of the 4th of November, 1876, he was to receive, on account of Variol's indebtedness, the proceeds of an intended sale of certain fixtures which, at that time, were in the store he had leased to the latter—some of which were sold, and some left to answer for said indebtedness. We are not informed whether he received the price, or any part of the price of those which were disposed of, and what became of those which were left; and—in as much as the evidence does not establish the precise balance due to Lafon by Variol, this cause must be remanded.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from is amended—and, accordingly, that the merchandise and wares therein mentioned be delivered to and sold—as the law directs—by the Civil Sheriff of the parish of Orleans, under the writ issued on Augé's judgment against Variol; and that, out of the proceeds of the sale which he is thus directed to make, said sheriff pay to T. Lafon, by preference—whatever may be found to be due to him—the said Lafon—as pledgee, on the claim secured by the contractentered into between him and Variol, on the 9th January, 1875; and that—after payment of the pledgee's claim—the balance, if any, be applied to the satisfaction of the aforesaid writ; the costs of the appeal to be paid by Augé, those of the garnishment by Lafon.

It is lastly ordered that this case be remanded to the lower court, for the purpose of ascertaining the amount due to Lafon, under the contract of pledge.

ON APPLICATION FOR REHEARING.

I.

We did not say, as plaintiff's counsel seem to believe, that Lafon's answer to the interrogatory propounded to him, could not have been either entirely or partly *disproved;* but we did say that standing, as it does, unimpeached and uncontradicted, it could not be arbitrarily divided.

In substance, Lafon was asked: do you have, in your possession, any effects belonging to Variol, and he answered: I have, but as a pledge; and that answer—as regards the title to and the possession of those effects—is the only evidence which was adduced on the trial. It discloses two closely connected facts: that he—Lafon—holds and how he holds, and that answer, which is the very foundation of plaintiff's rule against the garnishee, could not have been divided, for the sole purpose of unjustly changing the rank of their respective claims.

On this point, we are sustained by an almost endless list of authorities, and particularly by the 356th article of the Code of Practice, which provides that "the party wishing to avail himself of the confession made in answer to an interrogatory on facts and and articles, must not divide them, and that they must be taken entire."

2 M. 76; 3 N. S. 109; 4 L. 159; 18 L. 6; 4 R. 144; 1 M. 204; 9 M. 36; 11 M. 217; 9 R. 19, 173; 6 N. S. 569, 706; 1 L. 196; 3 A. 648; 4 A. 342; 15 A. 184, 618, 644, 656; 26 A. 251; 29 A. 540.

II.

It is persistently contended that—in form—the act of pledge relied upon by Lafon, is irregular. We thought and think otherwise. That act contains every one of the mentions which, according to the provisions of our Code, it should have contained; and—to adopt the construction insisted upon—we would have to judicially legislate and add another, an important mention to the only ones expressly indicated in the Code. C. C. 3158 (3125).

III.

There are before us but two creditors; they are each contesting the rank of the other's claim; and—in fixing that rank—we have determined an issue raised and presented by the parties themselves, and remanded the cause to ascertain what amount is, or may be due to Lafon, under the contract of pledge. In determining the real, and—in fact—the only issue raised in and by the pleadings, we did not, as charged, act prematurely.

The rehearing is refused.

No. 7345.

R. V. PICKENS VS. Z. T. WEBSTER, SHERIFF, AND SCHMIDT & ZEIGLER.

Movables of a lessee which are subject to the lessor's lien may be seized and sold under the execution of a judgment creditor of the lessee, subject to the lessor's lien on the proceeds of the sale. A right of pledge does not enable the pledgee to retain, as against creditors who seek by sale to compel the realization and distribution of the proceeds of the thing pledged. 2 N. S. 22; 1 N. S. 417; 13 La. 341; 31 A. 865.

The growing crop of a lessee is, to him, a movable, and hence is subject to be seized and sold by a judgment creditor of the lessee. 31 A. 245.

APPEAL from the Seventeenth Judicial District Court, parish of Red River. *Pierson*, J.

L. B. Watkins and *J. H. Pierson* for plaintiff and appellant.

J. F. Pierson for defendants and appellees.

The opinion of the court was delivered by

WHITE, J. The plaintiff leased a plantation to James Crow; during the existence of the lease Schmidt & Zeigler, judgment creditors of Crow, seized under execution the crop and certain other movables on the leased premises. The lessor enjoined: the defendant excepted no cause of action, which being maintained, plaintiff appealed.

The theory upon which the petition for injunction was drawn is, that any seizure of movables stricken with the landlord's privilege pledge and right of detention is a violation of the landlord's legal rights; and that, even although such be not the case, a growing crop being an immovable can not be seized separately from the soil. The correctness of these positions is the matter presented for solution, which may be thus stated:

1. Does the right of pledge given the lessor by C. C. 2705, and the power of detention accorded by C. C. 3218, render illegal a seizure of movables stricken with them? Or, in other words, does the authority granted by law to the lessor to take the effects themselves and keep them until he is paid prevent creditors from provoking a sale by which the things subject to detention can be converted into money, and the rights of creditors, if any, be exercised on the surplus, above the claim of the lessor?

2. Can a growing crop belonging to a lessee be seized?

We will consider the questions separately.

First. This question is not a new one in our jurisprudence. Tanner, administrator, vs. Tanner, 6 R. 35; Robb vs. Wagener, 5 A. 112; Aurick vs. Boisseau, 23 A. 605; Case, Receiver, vs. Kloppenburg, 27 A. 483. But while our reports are thus replete with cases wherein the matter has been discussed or directly passed on, the adjudications, instead of facilitating the decision of the case now presented, render it

more difficult, because of the irreconcilable difference which exists between the opinions expressed.

In Tanner, administrator, vs. Tanner, 6 Rob. 35, although the question of the right of detention does not seem to have been directly presented, the court said: "The right of detention which is a part of the lessor's remedy, affords him, to be sure, much greater security, but, like the pledgee and the creditor, having only a privilege, he must have the thing subject to his lien sold in the manner provided by law. When this takes place, if a conflict should arise in consequence of adverse claims on the same fund, a distribution of it must be made."

In Robb vs. Wagener, 5 A. 112, without any reference to the previous case, and without citation of authority, the court, in perpetuating an injunction taken by a lessor, laconically said: "No sheriff or United States marshal has the right, on an execution in favor of a third person, of taking away property on which the landlord has a privilege for rent and selling the same, pending an injunction taken out by the landlord, without paying the rent. * * When property on which a landlord has a privilege for rent has been seized on execution at the suit of a third person, the landlord has two remedies, either by way of a third opposition or by injunction."

In the Boisseau case, by an *obiter* the same doctrine was seemingly recognized; and, finally, in Case, Receiver, vs. Kloppenburg the foregoing cases were reviewed and the right of the lessor to enjoin pointedly denied; the court holding that the right of detention was no obstacle to a seizure and sale by creditors, in order that the claims of all might be paid by the distribution of the fund. The conclusion was not unanimous, two members of the court dissenting, the majority placing their decree on the inconvenience and incongruity to result from a different view; the minority admitting both the great inconvenience and denial of justice flowing from their conclusion, but resting their dissent on the maxim, *ita lex scripta est.* Thus, we have the right to seize supported by the first case in our reports, where the matter was considered, sustained by the last wherein the subject was elaborately discussed; the one being weakened by the fact that what was said was *obiter*, the other, in consequence of the division of the court, and because the conclusion was supported only by arguments of inconvenience. On the other hand, the paramount nature of the pledge and detention is sustained by two cases, one *obiter* the other, seemingly not well considered.

We are, therefore, compelled to approach the examination of the subject if not as *res integra*, at least as one wherein our conclusions must be predicated upon and justified by the reasons leading to them, without solely relying on the previous opinions expressed by this court. It is obvious on the very threshold of the inquiry that the reasons of

inconvenience which were cogently expressed in the Kloppenburg case present the issue strongly in favor of that construction which recognizes the right to seize. To hold that it does not exist will be a denial of right to the creditor, will be enabling a lessor, whose power of detention is only an accessory, to secure the sum due and to become due, to shield property largely in excess of the amount of his claim: thus creating in our system a contract destructive of the rights of others, and, also, subversive of the general principles by which the enforcement of obligations under our law is guaranteed; which are, that the property of a debtor is the common pledge of his creditors; that a right in one creditor to be paid from the proceeds of a certain thing does not prevent courts of justice, at the instance of other creditors having rights to be paid from the same thing, from directing a sale so that the claims of all may be classed, and the proceeds distributed to whom of right. That these inconveniences must necessarily flow from holding that the power of detention excludes the right to seize seems self-evident; for if the right does not exist no other remedy can be invoked by the creditor, although the lessor might detain twenty times the value of his claim.

It was suggested in argument that garnishment of the lessor would be a proper remedy, but, manifestly, such process would be futile if the power does not exist to direct the sale of the property and distribution of the proceeds: nor do we think the *argumentum ab inconvenienti* lessened by the suggestion that the creditor by paying the lessor could avail himself of the remedy of seizure; *non constat*, that he could pay, and even could he, the injustice of so compelling is manifest. The weight of these views is augmented by the consideration that no right of the lessor is impaired by a recognition of the right to seize, for the object of his accessory right of detention is payment, a payment which the seizure and sale accomplishes, with the rank allowed by law. Serious as these reasons may be, they ought not to control our decision if the text of the law be clear and unequivocal to the contrary. Is such the case? "The lessor has for the payment of his rent and other obligations of the lease a right of pledge on the movable effects of the lessee which are found on the leased premises." C. C. 2705. "The right which the lessor has over the products of the estate and on the movables which are found on the place leased for his rent is of a higher nature than mere privilege; the latter is only enforced on the price arising from the sale of the movables to which it applies. It does not enable the creditor to take or keep the effects themselves, specially. The lessor, on the contrary, may take the effects themselves, and retain them until he is paid." C. C. 3218.

Now, it is clear that the right of detention until paid is given as against the lessee, upon whom the obligation to pay rests, but it is far

from certain, taking the text alone as a guide, that one who has an interest in the thing detained, and upon whom no duty of paying rests, may not take steps to bring about payment by the realization and attribution of the proceeds. That the expression of the right to detain in favor of the lessor was not intended by the compilers to import it as to creditors can be easily inferred from C. C. 3225, which, while it gives one who has furnished material or incurred expenses for the preservation of a thing the right of detention until payment, also, in *express terms declares that the right shall exist as to creditors;* thereby, under the rule of *inclusio unius est*, excluding it in the case of the lessor. However, all doubt as to the nature and extent of the lessor's right of detention is removed on reading the text of C. C. 3218 by the light of the civil law, of which it forms a part, and from the sources of which the right of detention has been derived.

In the Roman law, the right of the lessor to be paid from the movables of the lessee was recognized at an early day. *L. 4 D.:* "*In quibus causis.*" Troplong du Nantissement, p. 16, no 12: Pothier, Contrat de Louage, no. 226. "We ordain," (says Justinian) "that the movables of the lessee shall be tacitly obliged to the proprietor for the payment of the rent." *Code,* "*In quibus causis pignus vel hypotheca taciti contrahitur.*" The pignus of the Roman law imported a right of detention superior to that given the pledgee under our system. *L. 40, sec. 2, Digest de pignerat actio.* Though such was the case, and the debtor, therefore, could not take back the things stricken without previous payment of all sums due, the like rule did not apply to creditors seeking to enforce their rights. Code, *L. 27, no. 1, et seq. Etiam ob chirographariam.* Troplong, in commenting on this distinction, concludes that although the pledgee was obliged to sell the things stricken with his rights in order to obtain payment, yet courts would not allow the defaulting pledgor to compel the sale, his duty being to pay, yet that such was not the case with creditors of the pledgor upon whom the obligation of payment did not devolve. Du Nantissement, p. 414, no. 453.

In the ancient law of France, in all the provinces, a right similar to the Roman-law pignus, or one designated by Pothier as "a species of pledge," was recognized as securing the lessor's rights. "Les grains et biens meubles d'un fermier et locataire sont taisiblement obligés pour les maisons et loyers du propriétaire," is the language of Loysel, Laporte Pandects Française, vol. 13. p. 189, and authorities by him quoted; Dumoulin sur Paris, art. 171; Pothier, Contrat de Louage, nos. 228, 229: Domat (Remy's edition, vol. 2, p. 39), book 3, tit. 1, sec. 5, no. 12. Under this state of law Domat says:

"Whatever may be the lessor's privilege on the movables of the essee for what may be due under the lease, he has not the right to pre-

vent the sale of the movables, although such sale may injure the continuation of the lease; he can exercise his privilege on the price of the movables." Domat, book 3, tit. 1, sec. 5, no. 12; Remy's edition, vol. 2, p. 39. The same views are attributed by Troplong to Cujas. Troplong du Nantissement, no. 465, p. 426.

Although in the Code Napoleon the quasi pledge of the lessor is not in terms expressed, it was considered by the compilers as inherent in the lease and tacitly resulting from it. Laporte Pandects Française, vol. 15, p. 188, and authorities there cited. The subsequent legislation of France rests on this theory, for the remedy created for the enforcement of the lessor's claims is designated as "saisie gagerie," or pledge seizure. Code de Procedure Civil, art. 819.

Now, under this system, identical with our own, the courts of France at an early day held that the rights of the lessor were no obstacle to a seizure and sale, the result of which would bring about a distribution. Enregistrement c. Gastry, Cassation, August 14, 1814, Journal du Palais for 1814, p. 366. The writers on the Code Napoleon, or the greater number, teach the same doctrine, resting it on the ground that the right of detention, whether resulting from the implied pledge of the lessor, or from the actual conventional pledge, is a right between the parties, and not, therefore, efficacious *erga omnes*. In fact, they view the right of detention as one not given to protect the pledgee from third parties, but from the pledgor. The principle is thus tersely stated by Troplong:

"The privilege is the right of the creditor as against third persons, *adversus creditores exteriores*. The right of detention, on the contrary, is an exception between the creditor and debtor." Troplong du Nantissement, no. 455, *et seq.*

"Le locateur," says Zachariæ, "n'a du reste en aucun cas le droit de s'opposer à la saisi et a la vente des objets soumis a son privilege lorsquelle sont poursuivies par d'autre créanciers." Zachariæ, vol. p. 110. "Dans le cas special du nantissement mobilier le droit de retention conferé au gagiste est purement personel et n'a d'action ou d'effet que dans les rapports du créancier au debiteur." Paul Pont's Petits Contrats, vol. 2, p. 658, no. 1184. He adds: "Par cela même qu'il est purement personel, dans l'hypothèse special du gage, le droit de retention laisse aux autres créanciers du debiteur la faculté de saisir la chose donnée en nantissement et de la faire vendre sans tenir compte de la possession du gagiste et sans avoir a le désintéresser. Le droit de ce dernier * * * se résume tout entier nous venons de le dire dans le privilege qui lui assure un rang préférable sur le prix. * * * *Ibid.*, vol. 2, no. 1185; Duranton, vol. 19, p. 131, no. 95.

These opinions and the examination which we have made lead but to one conclusion; which is, that the right of detention is no obstacle to

the seizure by a creditor. To hold the contrary, would, as we have seen, be contrary to the principle which took its being in the Roman law, whence the right of detention came, and has followed it in all its transmutations. The compilers of our Code did not in creating the right of detention do more than express a right known and applied wherever the wise principles of the civil law prevailed.

The text of our article seems to have been drawn from the Partidas, which, in speaking of the lessor's rights, uses language almost identical with that used by our Code; saying, "he can retain them as for pledges, until the latter shall pay him the rent." * * * Part. 5, Law 5, tit. 8. Lopez in his commentary refers this provision to the Roman Law; and Febrero, in his treatise, speaks of the lessor's right as a simple *preference* when urged against creditors: "Upon them" (the movables) "he is preferred to all the creditors of the lessee, of whatever rank;" thus indicating the right to distribution as the method by which the preference is to be obtained.

There is another view which is equally decisive; the text leaves no doubt that the lessor's right to detain is the consequence of his implied pledge; now, the detention resulting from the conventional pledge, by C. C. 3161, which is equivalent to that given the lessor, has long since been held, in accordance with the views we have above expressed, not to enable the pledgee to retain, as against creditors who seek by sale to compel the realization and distribution of the proceeds of the thing pledged, 2 N. S. 22; 1 N. S. 417; 13 La. 341; Ange vs. Variol, just decided. If the conventional pledge and actual detention has been so construed, *a fortiori*, a like conclusion is necessary where the right of pledge is simply a legal fiction.

We conclude, then, to adhere to the rule as laid down by our predecessors in Case, Receiver, vs. Kloppenburg, and, in consequence, we do not think the lessor's right of detention was violated by the seizure.

2. This branch of the case is disposed of by the case of Citizen's Bank vs. Wiltz, 31 A. 245. The crop of the lessee was his, and although, abstractly speaking, it may have been an immovable viewed from the lessee's point of view, it was a movable, or, at all events, an apparent immovable mobilized by anticipation.

The judgment is affirmed with costs.

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ABSENTEE.

A person who has formerly resided in this State but who has departed, and resided with his family in other States for several years, leaving no known agent here, is an absentee, and may be brought into court by a *curator ad hoc* appointed by the judge of the parish where he has property. *W. A. Bartlett* vs. *C. J. Wheeler*, 540.

ACTION.

A suit for the enforcement of a mortgage debt is not a real action. *Wisdom* vs. *Buckner*, 52.

The revocatory action can not be maintained by a creditor who not only fails to allege fraud, but who avers that his debtor parted from his property in error.

George W. Byrne vs. *Hibernia National Bank*, 81.

A creditor who has obtained possession of property of an insolvent debtor held in pledge by another creditor, by paying the debt due the latter, can not afterward sue to recover the money paid by him without offering to restore the pledged property. *Ib.*

When the heirs are either present or represented in the State, it is necessary to join them with the executor, as parties to an hypothecary action. In such case the executor alone is not capable of standing in judgment.

Mrs. Elise Labauve vs. *Henry R. Slack, Executor*, 134.

In an hypothecary action against a third possessor who is not the judgment debtor no other property is liable to seizure but that on which the mortgage rests. *Ib.*

The creditor of a vendor can not maintain a revocatory action to rescind the sale on the ground that the sale was in fraud of the vendor's creditors, unless he shows that the vendee was a party to the fraud. The fact that the price of the sale was below the actual value of the property does not authorize a conclusive presumption that either the vendor or vendee was actuated by a fraudulent intent. *J. W. Montgomery* vs. *E. T. Wilson et al*, 196.

To maintain a revocatory action it is necessary to make not only the holders of the title, but also the debtor, parties to the action.

Miltenberger vs. *Weems Heirs*, 259.

Creditors of a wife have no right to attack, on the ground of simulation a conveyance made by the husband to a third person.

Hardie vs. *Turner, Wilson & Co.*, 469.

ADMINISTRATORS AND EXECUTORS.

Damages will not be allowed against an executor on account of a wrongful injunction when it appears that he was disinterested, and acted in good faith for the interest of the succession.

Berens vs. *Executors*, *112.*

The service on an administrator of the order of court to file an account of his administration is a sufficient notice to him. No citation need be served on him, nor is he entitled to the delay of ten days for responding to the order.

State ex rel. W. W. Farmer vs, *Judge Parish Court of Ouachita*, *116.*

An executor who administers a succession which has already been partially administered, can only claim a commission proportioned to his services. The fact that his predecessor in the administration received no commission will not entitle him to make any additional claim. *Succession of Linton*, *130.*

An executor is entitled to a commission of five per cent on any sum not embraced in the inventory and actually collected by him. *Ib.*

An executor in filing his account has no right to reserve an amount in blank for discharging the necessary remaining expenses of closing the succession. *Ib.*

When it appears that an executrix who had exercised the functions of her office under the exceptional circumstances, and at the actual theatre of a civil war, performed her duties with discretion and honesty, she can not be held responsible in law for losses that were inevitable as a result of war.

Sara Stirling et al. vs. *Sara P. Lawrason*, *169.*

It is the duty of an administrator to set forth in his final account and tableau of distribution a detailed bill of the clerk's costs.

Succession of T. Gollain, *173.*

The administrator is not entitled to his commissions on the proceeds of property sold under executory process of an ordinary court, and which did not come into his hands for administration. *Ib.*

The administrator is not liable for any losses to the succession caused by any illegal acts of the sheriff in the sale of succession property under the executory process of an ordinary court. *Ib.*

The failure to appoint an attorney of absent heirs with whom to conduct contradictorily an application for the administratorship of the succession, will not affect the validity of the appointment of administrator. *Heirs of Herriman* vs. *John Janney*, *276.*

The acceptance of an insolvent surety on the bond of an administrator will not affect the validity of his appointment, or of his acts as administrator. *Ib.*

ADMINISTRATORS AND EXECUTORS—Continued.

The mere omission of the name of the succession in the body of the oath taken by one qualifying as the administrator of the succession, in the course of the mortuary proceedings, will not affect his qualification as administrator. *Ib.*

An administrator who allows the money of the succession to remain in the hands of a commission merchant becomes personally liable for the money if it is lost by the failure of the commission merchant. *Succession of W. R. Stone, 311.*

The language of the Code of Practice requiring the administrator of an insolvent succession to call a meeting of creditors to decide on the mode of selling its effects, is permissive, and not mandatory. *Ib.*

The bond of an administrator is an entirety, and is not to be canceled in part until the whole gestion is completed. *Ib.*

Where an account, acknowledged by the administrator in a writing without date, is declared on in an opposition as an acknowledged account, and annexed as part of the oppositson, and offered in evidence without objection on the part of the administrator, he can not, after having filed an answer to the opposition without denying his signature to the acknowledgment of the account, set up that his signature was not proved by the opposer. *Succession of Dinkgrave, 703.*

An administrator can not, by any form of acknowledgment, revive a prescribed debt of the succession. *Succession of Romero, 721.*

The amount of the bond to be given by a testamentary executor, when demanded by a creditor of the succession, is fixed by law at one fourth above the amount of the debt claimed. Neither the clerk, nor the judge has any authority to fix the amount. *Succession of François Feray, 727.*

If the security demanded by the creditor is not given by the executor within thirty days after service of the order of the court requiring it, the office of executor is, *ipso facto*, vacated, and the judge is required to appoint a dative testamentary executor. In such a case no suit for the removal of the executor is necessary. *Ib.*

AGENCY.

Where a factor takes the promissory note of his debtor for money due, and for advances to be made, and thereafter indorses and discounts the note and credits its maker with the proceeds, he does not, by subsequently taking up the note and debiting its maker with the price of taking it up, thereby extinguish the note, either by payment or by novation. He remains the owner of the note, capable of transferring a valid title to it. *Lanata* vs. *Bayhi, 229.*

AGENCY—Continued.

Where a debtor executes his promissory notes to his factor in order to cover advances due and to become due, the fact that the aggregate sum of the notes is something larger than the sum then exigible, will not impair the valid consideration of the notes, or convert them from principal into merely accessory debts. *Ib.*

The employment of an attorney to defend a suit does not authorize him to receive from the sheriff the proceeds of the defendant's property sold under judgment in that suit.

Germaine, Tutrix, vs. *Mallerich, 371.*

A partition of property being an alienation by each of the co-proprietors, it follows that one agent or legal representative can not represent five or six co-proprietors in the agreement fixing the terms of the partition. *Metcalfe* vs. *Alter, 389.*

One who makes a contract of lease as agent of a company which has no existence, makes himself personally liable for the rent, when it appears from the evidence that he was the real lessee, and that the business for which the lease was made was his business.

Washburn, Administrator, vs. *Frank, Agent, 427.*

The Southern Bank can not be held liable by the city of New Orleans for using the city bonds (issued under the act of the 27th of February, 1868, and deposited with the bank as Fiscal Agent of the city) to liquidate, and fund at par such debts of the city as were embraced in the statement prepared by the Comptroller and Treasurer of the city, verified by the Mayor, and members of the Finance Committees, of the Board of Aldermen and Assistant Aldermen, and placed in the hands of the Fiscal Agent for its guidance. The Bank had no power to go behind that statement, and refuse to fund any debt embraced therein.

City of New Orleans vs. *the Southern Bank, 560.*

Where a municipal corporation approves, and ratifies the illegal, and unauthorized action of its agent, and afterwards, when sued by a third person, pleads such action and its results as a ground of defense, it is thereby estopped from subsequently pursuing the agent on account of such actions. *Ib.*

A charge by a factor "for advancing" money, over and above eight per cent per annum interest, can not, under the general issue, be recovered. *Chaffe & Sons* vs. *Heyner, 594.*

SEE MCINTOSH VS. KELLY, 649.

AMICABLE COMPOUNDERS.

SEE ARBITRATION.

APPEAL.

A suspensive appeal will not lie from an order of the District Court of the State transferring a suit from another District Court of the State.

The State ex rel. T. Fontelieu et al. vs. *The Judge of the Sixteenth District*, 47.

An appeal does not lie from an order of the probate court imprisoning an administrator for contempt of court in refusing to obey a peremptory mandate to file an account within a certain delay.

State ex rel. Farmer vs. *Judge Parish Court of Ouachita*, 116.

The filing of an answer in this court by the appellee, in which he does not reserve his right to dismiss the appeal, amounts to an abandonment of his previous motion to dismiss.

H. B. Claflin & Co. vs. *Lisso & Scheen*, 171.

An objection that the claims of the physician and nurse in the last illness were not recorded, and therefore can not be ranked as privileged debts, can not be raised for the first time in this court. It must have been pleaded in the lower court.

Succession of Gollain, 173.

Where the plaintiff in injunction, and the surety on her bond take separate suspensive appeals from the judgment dissolving the injunction, and the plaintiff's suspensive appeal is dismissed and a judgment on appeal is rendered against her surety, her right to take a devolutive appeal will not be suspended while the application for a rehearing on the part of her surety is pending. She has a right to a devolutive appeal so soon as the decree dismissing her suspensive appeal becomes final.

Bowman et al. vs. *Kaufman, Sheriff, et al.*, 193.

A decree of court refusing to order the executor, on motion of a judgment creditor of an heir, to turn over to the sheriff the undivided portion of the heir in a succession whose debts and legacies have not been paid, is an interlocutory decree from which the creditor can not appeal. *Deblieux & Co.* vs. *Hotard*, 194.

This court has jurisdiction of a suit in which the appellant, in his affidavit accompanying his application for an appeal, places his damages at issue in the suit at over $500.

State ex rel. Soares vs. *Hebrew Congregation "Dispersed of Judah,"* 205.

The failure to perfect a suspensive appeal does not prevent the appellant from subsequently obtaining a devolutive appeal. *Ib.*

A motion to dismiss an appeal taken after the lapse of three days from the filing of the record in this court is too late.

De St. Romes vs. *Levee Steam Cotton Press Co.*, 224.

This court will, notwithstanding the acquiescence of the appellant in the judgment he has appealed from, proceed with the case, on the

APPEAL—Continued.

demand of the appellee, and change, or confirm the judgment for the latter's benefit. *Ib.*

An appellant who is unable to furnish an appeal bond will be allowed, in place of the bond, to deposit with the clerk of court granting the appeal the amount of the bond fixed by the court.

Lanata vs. *Bayhi*, 229.

It is too late to object in this court that under the note of evidence of "Proceedings" of the court in another suit, matter was introduced that did not properly constitute a part of those proceedings, when it does not appear that any objection was raised below when the matter was being introduced in evidence. *Perry* vs. *Rue*, 287.

Where the sureties on a five-thousand-dollar bond are jointly sued for an amount aggregating two thousand dollars, this court will have jurisdiction, although the demand against each surety is less than $500.

State ex rel. School Board, Parish of St. Tammany, vs. *Cousin et al.*, 297.

The affidavit of an appellee that his interest in a suit is less than $500 will not defeat the appeal, when it appears by the allegations of the plaintiff's petition, or his subsequent affidavit, that the amount involved is more than $500.

La. Board of Trustees of the American Printing-House for the Blind vs. *Dupuy et al.*, 305.

If the petition for an appeal contains no prayer for a citation, and the record fails to show that a citation was ordered, issued, or served, the appeal must be dismissed.

Gerodias vs. *Handy, Sheriff, et al.*, 334.

The violation of the rules of this court in reference to the preparation of transcripts of appeal is no cause for the dismissal of the appeal.

Washburn, Administrator, vs. *Frank, Agent*, 427.

Where the clerk of the lower court certifies the completeness of the transcript the mere fact that it was compiled by one of the parties will not justify a dismissal of the appeal. *Ib.*

Where it is not denied, it will be presumed that the motions for an appeal were applied for and granted in open court. *Ib.*

Damages will be given for a frivolous appeal. *Ib.*

This court can not entertain a demand for relief made by intervenors who have not appealed from the judgment rendered against them by the lower court. *Laloire* vs. *Wiltz*, 436.

An appeal will lie from a judgment on an intervention on third opposition claiming less than the appealable amount, when the demand of the plaintiff is for an appealable amount.

Aller vs. *O'Brien*, 452.

APPEAL—Continued.

An endorsement by the clerk of the lower court, appearing in the transcript of appeal, on the back of all the documentary evidence in the case, except the note and mortgage "filed as evidence April, 1878," is a sufficient note of evidence, when it appears that the note and mortgage were made part of the petition, and that the judgment is on the note with full recognition of the mortgage.

Maumus vs. *Beynet*, 462.

Where the judge below makes a written statement of the oral evidence given, it is sufficient for him to declare that his statement contains as far as he can recollect, and from notes of counsel, all the facts in the case. *Ib.*

Where the assessment, insurance, and rental of the property in dispute show that it must be worth over $500, this court will have jurisdiction. *Ib.*

The complaint by a taxpayer of excessive valuation of his property by the Board of Assessors can not be heard in this court when it appears that he did not appeal to the lower court for the correction of the over valuation complained of.

N. O. City Gas Light Co. vs. *Board of Assessors*, 475.

It is not necessary that the name of the clerk of the lower court should appear in the body of the transcript of appeal. His signature thereto is sufficient. *Elder* vs. *City of New Orleans*, 500.

Where a formal agreement between counsel has been made as to what shall be included in a transcript of appeal, the clerk's certificate that the transcript contains all the documents, records, etc., required by the agreement, will be sufficient. *Ib.*

The lower court fixes the return day of an appeal, and hence if it is erroneously fixed, the error can not prejudice the appellant. *Ib.*

The principal and surety on an injunction bond, who, on the dissolution of the injunction, have been condemned *in solido* for a certain sum, may unite and give but one appeal bond, with a surety who binds himself "for both and for either," in the sum fixed by the court.

Ib.

Where the appellant gives bond in the amount fixed by the court, the appeal can not be dismissed on the ground that the amount is insufficient. *Ib.*

Where an injunction issues to restrain the sale of property worth over $500, coupled with a demand for damages for a large amount, this court will have jurisdiction of an appeal from the judgment dissolving the injunction. *Ib.*

Where an appeal is taken by motion neither petition nor citation is necessary. *Jacob* vs. *Preston*, 514.

The district courts of the parish of Orleans have but one term, which

APPEAL—Continued.

extends from the first Monday in November to the fourth day of July; and an appeal may be taken by motion in open court, at any time during that term, on a judgment signed during the term. *Ib.*

Where one of the parties to the suit takes a rule on the other, raising certain issues, and the other party takes a counter rule, involving the same issues, and the rules are tried and decided together on the same day, and treated by parties, attorneys, and the court as if consolidated, and an appeal is taken from the judgment of the court making the counter rule absolute, the appeal will not be dismissed on the ground that the judgment on the original rule not having been appealed from within a year, had acquired the force of *res adjudicata.* *Ib.*

Where the judgment of the lower court dismisses the petition of the intervenor in the suit, and gives a decree in favor of the defendant as against the plaintiff, and the plaintiff alone appeals, the intervenor will not be before this court either as appellant or appellee, and hence the judgment as to him can not be reviewed. *White* vs. *Fifth Regular Baptist Church*, 521.

Where the evidence appearing in a transcript is so confused and contradictory that the labor of an expert is necessary to educe the facts requisite to the administration of justice, the case will be remanded, in order that the parties be referred to an expert before the case is taken under advisement by the court. *McConnell* vs. *Pasley*, 532.

Where the legality and constitutionality of a tax is in contestation, this court has jurisdiction, no matter how small the amount in dispute may be. *Cole* vs. *Randolph*, 535.

Where the legality and constitutionality of a fine and penalty, imposed by a city ordinance, is in contestation, this court has jurisdiction irrespective of the amount in dispute. *State* vs. *Gisch*, 544.

An order of appeal on motion in open court which fixes the return day on a day this court is not in session is not ground for dismissing the appeal. Such an order, although made in compliance with the motion of appellant's attorney, is the act of the court, and hence the error of it is not imputable to the appellant. *Chaffe & Sons* vs. *Heyner*, 594.

Records of other suits, made part of, and filed with the petition of appeal, are not part of the evidence, and will not be considered on appeal. *Renshaw, Cammack & Co.* vs. *Imboden et al.*, 661.

This court has not jurisdiction of an appeal from the judgment of a parish court, where the amount involved is $500, exclusive of interest. *Babin, Administrator*, vs. *Delahoussaye*, 725.

APPEAL—Continued.

As between appellees the decree of the lower court can not be revised, amended, or reversed.

Boisse and Husband vs. *Dickson, Administratrix, et al.*, 741.

The petition of appellant, verified by his oath in a suit to enjoin a sale, that the property sold, and which he claims is worth over $600, gives this court jurisdiction, although it may appear that he bought the property for $400, subject to taxes, and that the judgment under which the sale was made was for only $200.

Testart vs. *Belot et al.*, 795.

An interlocutory decree ordering a sale of corporate property to be made by persons without legal power to sell, may inflict irreparable injury on a stockholder of the corporation, and hence may be suspensively appealed from by him.

State ex rel. Morey vs. *Judge of the Fifth District Court*, 823.

The fact that a corporator might seek recourse on the bond of the seeming liquidators of the corporation, on account of the sale of corporate property by them, demonstrates his right of appeal from a decree of court ordering the sale, *Ib.*

This court is without jurisdiction of an appeal from a judgment condemning a party to pay a penalty, or forfeiture of fifty dollars, imposed by a statute of the State.

Barry, Inspector, etc., vs. *Garnier, etc.*, 831.

A suspensive appeal lies from an order of a lower court refusing to grant a preliminary injunction, and the judge of the court may be compelled by mandamus to grant such an appeal.

State ex rel. Becker vs. *Judge of the Sixth District Court*, 850.

This court is without jurisdiction where the amount involved is less than $500. *Henriette Henri* vs. *Francis Francincues et al.*, 856.

Where the testimony in the lower court was not reduced to writing, and no statement of facts was agreed on by the counsel of the parties and the judge who tried the case could, on being applied to, give a vague and general impression only of the testimony, the appeal must be dismissed. *Ib.*

A party who takes a suspensive appeal, and fails to prosecute it, thereby forfeits his right to a devolutive appeal.

Laussade vs. *Maury et al.*, 858.

ARBITRATION.

Where the parties to a suit in order to avoid further litigation agree to submit the adjustment of their differences to arbitrators, and the agreement to submit is couched in such terms as makes the extent of the arbitrators' jurisdiction a matter of doubt, the matter will be construed by the light of the pleadings in the suit which was discontinued by the agreement, and all questions put at issue by

ARBITRATION—Continued.

those pleadings will fall within the powers of the arbitrators to decide. *Jackson & Manson* vs. *Hoffman et al.*, 97.

The party in whose favor arbitrators have rendered their award may sue the debtor for the recovery of the award, or may exact from him the penalty stipulated for the non-performance of the award, but he can not demand both the award and the penalty, unless the penalty has been stipulated for mere delay. *Ib.*

In a proceeding to make the award of amicable compounders executory it may be shown that the compounders acted beyond the authority with which they were invested. Any award of theirs not authorized by the terms of the agreement to submit, is void, and may be resisted. *In re John Wallace*, 335.

The award of amicable compounders within the scope of their authority is conclusive as to the parties who agreed to submit, and is not reviewable by the courts. *Ib.*

ARREST FOR DEBT.

A debtor who has been legally arrested and imprisoned for debt, under a writ issued in a civil suit, cannot, by confessing judgment, acquire the right to be discharged from arrest.

State ex rel. Wung Chung vs. *Civil Sheriff of Orleans Parish*, 799.

ASSESSMENT OF TAXES.

Where an owner of real estate who complains of the over assessment of his property by the Board of Assessors, has the matter submitted to the two referees provided for in act No. 96 of the Legislature of 1877, he is concluded by the decision agreed on by the two referees, and can not appeal from that decision to the courts.

N. O. Gas Light Co. vs. *Board of Assessors*, 270.

The paid up capital stock of the New Orleans Gas Light Company is subject to assessment and taxation, like any property of that corporation. The value of such stock is to be ascertained from the market price or in any other manner.

N. O. City Gas Light Co. vs. *Board of Assessors*, 475.

Vacant property, whose owner does not reside in the parish where it is situated, may be validly assessed as the property of its immediately preceding, but deceased owner, of whose succession it is a part and in whose name it stood on the public records.

Sewell et al. vs. *Watson*, 589.

The assessment of certain real estate made in the year 1877 for four years under the statute of that year, and not complained of then, can not be changed thereafter during the four years, except to make

ASSESSMENT OF TAXES—Continued.

proper subtraction for destruction, or proper addition for improvements to the property, made after the assessment.

State ex rel. Canton vs. *Board of Assessors*, 806.

The assessment of the property of a tax-payer on the assessment rolls, and the methods used in fixing its value are presumed to be correct until he proves the contrary.

City of N. O. vs. *La. Savings Bank and Safe Deposit Co.*, 826.

It is not necessary that the assessment roll should *itemize* the property of a corporation over and above its capital stock, designated as surplus. *Ib.*

In assessing the real estate of a corporation its present, and not its cost value, is the standard of valuation. *Ib.*

A transposition of figures from one column of the assessment rolls to another column, made by one of the assessors without the authority of the Board of Assessors, and made after the rolls were closed, is of no effect, and in construing the rolls will be held as not having been done.

St. Charles St. R. R. Co. vs. *Board of Assessors*, 852.

An assessment of the capital stock of a corporation at its par value, when the evidence shows it has a higher market value, is a valid assessment. *Ib.*

The law which makes the *market* value of the evidences of rights to the capital of a corporation, as a criterion of value, for purposes of taxation, of its capital, or capital stock, is not unconstitutional. *Ib.*

ATTACHMENT.

A judge has no authority to release an attachment of property claimed to be exempt from seizure on the *ex parte* application of the defendant. The plaintiff must be duly notified of the application, and given an opportunity to be heard.

Claflin & Co. vs. *Lisso & Scheen*, 171.

ATTORNEY AT LAW.

In determining the amount to be allowed to an attorney for professional services in behalf of a succession the court will be guided by the extent and character of the services rendered, and also by the size and value of the succession. *Succession of Linton*, 130.

BANKRUPT LAW.

An insolvent debtor who has under the bankrupt law made a composition with his creditors, may, in the absence of contrary stipulations, authorize an agent to sue for and collect his assets.

John M. Henderson, Trustee, vs. *Case, Receiver of the Crescent City National Bank*, 215.

BANKRUPT LAW—Continued.

The publication of the notices required by the bankrupt law of the United States on the part of the bankrupt, will, in the absence of fraudulent omission of the name of a creditor from his schedule, bar any claim of that creditor provable under the bankrupt act.
Henrietta S. Noland, Executrix, vs. *Clifford G. Wayne*, 401.

Where the liability of a surety on a sequestration bond is fixed by a judgment at the date of the principal's adjudication in bankruptcy, the claim of the surety against the principal is provable under the bankrupt act, and hence is extinguished by the principal's discharge in bankruptcy; even though it appear that at the time of the adjudication in bankrupcty, the surety had paid nothing on account of his liability. *Ib.*

An insolvent who has made a voluntary surrender, and obtained a discharge under the bankrupt law of the United States, is estopped from suing to recover, or setting up a title to property, which he alleges was his at the time he surrendered in bankruptcy, but of which he avers he had made a simulated transfer, to prevent it from passing into the hands of his assignee, and thus protect it from the recourse of his creditors. "*Nemo allegans suam turpitudinem est audiendus.*" *Govy Hood* vs. *Henry Frellsen*, 577.

Where a sum of money is received by a factor and commission merchant, under a written stipulation of the factor that he received the money to be invested by him for the owner's account, the debt thus incurred by the factor is a fiduciary one, and under the United States Bankrupt Act of 1867, is not affected by the factor's discharge in bankruptcy. *Louis Desobry* vs. *Henry Tete*, 809.

The balance due by a factor to his client whether liquidated by the promissory note of the factor, or not, is not, in the hands of a transferree of the client, a fiduciary debt, and therefore is extinguished by the factor's discharge in bankruptcy. *Ib.*

BANKS.

Where a bank certifies as good a check on it to the order of a certain payee, and the check is subsequently altered by the drawer so as to make it payable to bearer, and thus altered is paid by the bank to some unknown party before the original payee is advised of the certification, and before any third person has acquired an interest in the check, the bank can not be held for any loss to others caused by paying the check, because of an agreement between those others and the drawer, to which the bank was not privy.
Abrams & Co. vs. *Union National Bank*, 61.

BILLS AND NOTES.

The purchaser of a dishonored bill, who buys it from one who is not the owner, and who is not authorized to sell, acquires no title as against the real owner. *Henderson* vs. *Case*, 215.

One who buys a negotiable note after its maturity takes it subject to all of the defenses that could be pleaded against his assignor.

De St. Romes vs. *Levee Steam Cotton Press Co.*, 229.

A waiver of protest by the indorsers of a promissory note includes a waiver of demand.

Harvey vs. *Nelson, Lanphier & Co, and Short*, 434.

The surrender of a matured mortgage-note, and the cancellation of the mortgage, is a sufficient consideration for a second note for the same debt, secured by a second mortgage, and payable at a later date. *O'Keefe* vs. *Handy, Sheriff, et al.*, 832.

See Bradish Johnson vs. Butler, 770.

BOARD OF LIQUIDATION.

A mandamus will not issue to compel the Board of Liquidation to fund certain warrants when it does not appear that any demand to fund them was ever made on the Board. A demand on the Auditor of the State to fund warrants will not put the Board of Liquidation in default. *State ex rel. Bartlette* vs. *Board of Liquidation*, 273.

BONDS (OF THE STATE).

Bonds of the State issued in strict conformity to law, and for a valid consideration, and not shown to have constituted a part of the free-school fund, are entitled, under the funding act of 1874, to be exchanged for the consolidated bonds of the State.

Sterry vs. *Board of Liquidation*, 46.

CITATION.

See Practice and Pleading.

CLERK OF COURT.

The clerk of the probate court has power to render an order of sale of succession property. *Heirs of Herriman* vs. *Janney*, 276.

COMMUNITY.

A widow, who by a series of acts extending through years has tacitly accepted the community, can not afterward renounce it.

Wisdom vs. *Parker*, 52.

A man and a woman, in contemplation of marriage, may enter into a valid marriage contract by which it is stipulated that certain separate property of the man and of the woman shall enter into, and form a part of the community to arise between them as husband and wife. And the property embraced in the contract shall constitute a portion of said community.

Hanley vs. *Mary A. Drumm*, 106.

COMMUNITY—Continued.

A widow who mortgages her undivided half of a certain piece of community property thereby accepts the community.

Cestac vs. *Florane*, 493.

CONSIGNOR AND CONSIGNEE.

Where cotton, which had been transferred by a planter in a neighboring State, under the form of conveyance of the common law chattel-mortgage, to secure a certain creditor, is afterwards shipped by a common carrier *for the account* of the creditor, the delivery of the cotton to the carrier is a transfer of the legal title to the creditor, who thereby becomes in effect the consignor, and whose rights of ownership of the cotton can not be affected by an attachment levied by any other creditor of the shipper.

Chaffe & Sons vs. *Heyner*, 594.

The action of a consignee in accepting or refusing a consignment can not affect the consignor's title to the goods consigned. *Ib.*

Where two lots of goods are consigned by one single bill of lading, for account of two different persons, the consignee can not accept the consignment as to one lot, and refuse it as to the other. If he accepts as to one, he thereby accepts as to both. *Ib.*

The rights of a consignee, on the goods shipped to him, who has refused to accept the consignment, and who attaches the goods as an ordinary creditor, are subordinate to the rights of an intervenor who has advanced on the goods, and holds as the transferree of the consignor, the bill of lading of the goods. The intervenor in such a case has a right of pledge on the goods.

Chopin vs. *Clark*, 846.

CONSTITUTION.

Article 127 of the constitution of 1845, requiring that taxation shall be equal and uniform, applies as well to municipal as to State taxes.

State ex rel. Southern Bank vs. *Pilsbury, Mayor*, 1.

An obligation which was valid when incurred can not be impaired by any amendment of the constitution of the State.

Cole vs. *La Chambre et al.*, 41.

There is no unconstitutional discrimination in forbidding markets within certain prescribed limits, and imposing a license on all who keep markets outside of those limits. *State* vs. *Gisch*, 544.

CONTEMPT OF COURT.

A party may be imprisoned for a contempt of court without the previous finding of an indictment, or laying of an information against him for the offense.

State ex rel. Farmer vs. *Judge Parish Court of Ouachita*, 116.

CONTRACTS.

The forms of legal remedies in force at the date of a contract make no part of the contract.

State ex rel. Southern Bank vs. *Pilsbury, Mayor, et al., 1.*

The pleas of error of law, of fraud, and of want of consideration, will not avail to defeat the enforcement of a written and honorable obligation, unless they are clearly proved.

Fairchild vs. *McEnery et al., 695.*

CORPORATION.

A creditor of a corporation suing to forfeit its charter on the ground of its insolvency must, before he can demand the provisional appointment of a receiver or judicial sequestrator, under section 688 of the Revised Statutes, prove that the corporation is the special kind of corporation subject to a forced liquidation under that section.

Bothick vs. *Society Temine Dereche, 63.*

In order to make the pledge of a certificate of the stock of a corporation valid as to third persons it is not necessary to give notice of the pledge to the company.

Factors' and Traders' Insurance Company vs. *Marine Dry Dock and Shipyard Company, 149.*

Where knowledge of a fact by a corporation is necessary, the corporation is held to know concerning that fact whatever its president and other chief officers know. *Ib.*

A corporation is liable for the damages caused by the wrongful canceling of a certificate of its stock by its president and secretary. *Ib.*

A corporation can not be held to knowledge of the ownership of eighty shares of its stock by any transferree of a certificate of that stock merely because he, through an agent, voted at an election, at which 12,475 shares voted in the affirmative, and 68 only in the negative.

Friedlander vs. *Slaughter House Co., 523.*

Where certain stock of a corporation, standing on its books in the name of a judgment debtor, is seized and sold by the sheriff as the debtor's property, and a judicial tribunal, of competent jurisdiction, of last resort, after a fair contest, in good faith, by the corporation, orders the stock to be transferred to the purchaser under such seizure and sale, the corporation can not be liable to the holder of the certificate of the stock, who took no steps to protect himself. *Ib.*

A municipal corporation, under legislative permission, can forbid the opening of markets, except at designated places, and such forbidding is an exercise of its power to regulate markets.

State vs. *Gisch, 544.*

CORPORATION—Continued.

The court may on its own motion appoint a liquidator, or receiver of a corporation, where its charter makes no provision for its liquidation and the necessity for its liquidation shall arise.

In the Matter of the Mechanics' Society, 627.

A corporation authorized to sell its property is in general authorized to mortgage it. *Ib.*

The New-Orleans Mechanics' Society was authorized to mortgage its property to raise the means necessary to make the repairs required by the joint resolution of the Legislature of 1867, and the holders of the mortgage may sell the property to satisfy their debt, but the purchaser must take it subject to the same liability of forfeiture to the State it was under while owned by the society. *Ib.*

Where a petition is filed praying, for certain alleged reasons, the forfeiture of the charter of a banking corporation, an order of court, which does not decree the forfeiture, but which merely appoints commissioners to take charge of the assets of the corporation, can not be construed as directing the liquidation of the affairs of the corporation.

State ex rel. Morey vs. *Judge of the Fifth District Court*, 823.

A stockholder of a corporation has an interest to prevent the sale of the corporate property by persons having no legal power or mandate to sell. *Ib.*

Before a suit for the forfeiture of the charter of any bank located in the city of New Orleans can be entertained, it is *indispensable* that a petition praying for the forfeiture shall be presented by the Attorney General, or by the district attorney, or by them both.

State vs. *Citizens' Savings Bank*, 836.

The officers of a bank are without authority to waive the service of a petition praying a forfeiture of its charter, or to waive the delay within which third persons may intervene to protect their interest, or of filing an answer which virtually confesses the forfeiture of the charter, and admits the necessity of the immediate liquidation of the bank. *Ib.*

A court is without authority to order the liquidation of a bank and the transfer of its assets to commissioners until the propriety of such an order has, on proper inquiry, been judicially ascertained. *Ib.*

See *in re* Mechanics' Society, 627.

COSTS.

See Practice and Pleading.

COUNTER-LETTERS.

Private counter-letters have no effect as against creditors.

Succession of Tabary, 409.

COURTS.

The probate court before which a succession has been opened, and is being administered, has jurisdiction, at the instance of a mortgage creditor of the succession, to order the sale of the mortgaged property, and the sale of such property, under an order of seizure and sale issued by the probate court, is not a nullity. The order must stand as a binding decree of court until reversed by an action of nullity, or on appeal. *Wisdom* vs. *Buckner*, 52.

The Third District Court for the parish of Orleans has no authority on the application of one party to enjoin another party from prosecuting suits brought by him in a justice's court against third persons, and to which the one asking for the injunction is not a party.
Lannes et al. vs. *Courege et al.*, 74.

The adjustment of conflicting mortgage claims falls within the jurisdiction of the court from which the process issued under which the sale of the mortgage property was made.
Factors' and Traders' Insurance Co. vs. *DeBlanc et al.*, 100.

Courts of ordinary jurisdiction are empowered to issue writs of seizure and sale against succession property.
Berens vs. *Executors of Boutte*, 112.

A suit against the surviving, and liquidating partner, by the succession of the deceased partner, for a settlement, or a partition, must be brought in a court of ordinary jurisdiction.
Walmsley and Patterson vs. *Mendelsohn & Newman*, 152.

The parish court is without jurisdiction of an action of revendication brought to recover property worth over $500, and which was sold by the administrator of a succession no longer in existence.
Fields, Tutrix, vs. *Gagné and Wife*, 182.

A parish court has no jurisdiction of a suit brought to annul a judgment of a district court. *Ib.*

Where the lower judge rejects the evidence of a witness on the ground that she was, on her own uncontradicted testimony, the wife of the accused, he decides a question of fact, and his decision can not be reviewed by this court. If the woman were not really the wife of the accused, that fact should have been set forth in affidavits on an application for a new trial. *State* vs. *Pritchard*, 209.

Where the plaintiff avers in his petition for an injunction that the acts of the defendant have already caused him damage in the sum of $500, and will, unless restrained, cause him a further damage of $2000, the district court has jurisdiction.
Gay vs. *N. O. Pacific R. W. Co.*, 274.

The district court is without jurisdiction of a suit by an administratrix to compel a creditor of the succession, who has had certain succession property sold under executory process, to pay over the pro-

COURTS—Continued.

ceeds of the property for distribution between herself and her minor children. The object of such a suit is to settle a succession, which the parish court alone has authority to do. *Gordon* vs. *Knox*, 284.

The courts are invested with full power to inquire into and pronounce on the validity of election returns. *Knight* vs. *Ragan*, 289.

A probate judge is disqualified to pass on the homologation of an executor's account when he is put down on the account as creditor even of a paid debt. *Succession of Rhea*, 323.

Where a suit is instituted in the court of one parish and there prosecuted to a judgment, is removed by an act of the Legislature to the court of another parish, which is invested by the act with full jurisdiction of the case, the latter court has jurisdiction of the suit to revive the judgment in said suit.

Hammett vs. *Sprowl et al.*, 325.

A succession being thus at an end, the heirs are owners in common of the hereditary effects, and the Second Court of New Orleans, being a court of Probates only, is without jurisdiction of a suit for their partition. Woolfolk v. Woolfolk, 30 Annual 139, approved.

Freret vs. *Heirs of Freret*, 506.

The court of ordinary jurisdiction, and not the probate court, has jurisdiction of a suit for the partition of property which belongs in part to the major and minor heirs of of a deceased wife, and in part to the surviving husband. It is only when the property belongs wholly to a succession, under administration, that the probate court has jurisdiction of a suit for its partition.

Buddecke vs. *Buddecke et al.*, 572.

The parish court has jurisdiction to issue an order of seizure and sale, where the amount involved is $500, exclusive of interest.

Babin, Administrator, vs. *Delahoussaye*, 725.

Where executory proceedings are taken in a parish court, all conflicting claims of privilege or mortgage on the property ordered to be sold, no matter how large the claims, must be brought in the parish court for classification and adjustment. *Ib.*

A demand that the administratrix of a succession, and widow in community, shall file an account, so that the plaintiff, who claims to be the transferree of one of the heirs, may obtain a settlement of the rights involved in the unsettled community and succession, is of a probate character, and hence, irrespective of the amount in dispute, is within the jurisdiction of the parish court.

Boisse and Husband vs. *Dickson, Administratrix, et al.*, 741.

The parish court is without jurisdiction to enjoin the execution of a judgment of the United States Court, or of a District Court of the State. *Shields* vs. *Pipes, Tax Collector*, 765.

SEE CHAPMAN VS. NELSON, 341.

CRIMINAL LAW.

Before this court can pass on the question whether the lower judge rightfully refused to allow the change of venue asked for by a prisoner on trial for murder, the evidence on which the application for a change of venue was made must be brought before it in a bill of exceptions. *State* vs. *Daniel*, 91.

This court will only reverse the ruling of the lower court on the question of a change of venue when the evidence brought up in a bill of exceptions shows indisputably that the judge below has misapplied or arbitrarily violated the law. *Ib.*

The clerical error of writing the word "parish," instead of the name of the parish where the killing was done, in the copy of the indictment served on the accused, when the caption of the copy gives the name of the parish, is no ground for continuance. *Ib.*

Where no fraud or wrong is shown, no objection of irregularity as to the drawing of the venire for a certain term of court will be sustained, if made after the first day of the term. *Ib.*

Since the passage of the act of 1873 (page 166, sections 2 and 15), the members of a police jury may be drawn as talesmen in criminal trials. *Ib.*

Dying declarations are admissible, whether made to an officer or private person, and whether verbal or written. *Ib.*

Declarations made under a belief of impending death are dying declarations, although the wounded man making them did not die until several days thereafter. *Ib.*

The fact that the accused offered no evidence on his trial does not give to his counsel the right to the closing argument. *Ib.*

The accused may be tried on a second indictment for murder when the first indictment was invalid. *Ib.*

In criminal cases no foreman need be appointed to the jury, and the verdict of the jury may be delivered orally and in open court. *Ib.*

An indictment for murder correctly charges that the crime was committed on the day that the mortal blow was given, although it appears that the deceased did not die until a day following the blow. *State* vs. *Wallman*, 146.

Evidence will not be admitted to show that one of the jurors in a murder case only agreed to the verdict of guilty on condition that a petition signed by every member of the jury should be addressed to the Governor asking that the penalty be commuted from death to imprisonment for life. *Ib.*

An information which charges that the accused stole "one mule valued at seventy dollars, the property of John M. DeFee," sufficiently describes the stolen property. *State* vs. *King*, 179.

CRIMINAL LAW—Continued.

The granting of a continuance in a criminal case is within the sound discretion of the court. *Ib.*

A witness who testifies to the confessions of one accused of crime is not required to swear to the precise words of the accused. It is enough that he testifies to the substance of what the accused said.

State vs. *Avery*, *181.*

Whether the confessions of an accused were induced by threats or promises is a question of fact which this court can not review.

Ib.

A sheriff can not legally authorize a constable elected in and for another parish to execute, within the parish of which he is sheriff, an attachment issued for an absent witness in a criminal case, and a return made by such a constable that the witness "could not be found," is not sufficient. A return in such a case must be specific, and describe what inquiry and search for the witness had been made.

State vs. *Boitreaux*, *188.*

When a prisoner has, in proper time, ordered subpœnas to issue, he can not be compelled to apply for attachments, swear to the facts he intends to prove by his witnesses, or go to trial without them, until an earnest and vain effort has been made to bring them into court.

Ib.

Where a reasonable doubt exists as to whether an accused, charged with a capital offense, has had sufficient assistance given to him to enable him to produce his witnesses, he must be given the benefit of the doubt. *Ib.*

Where the counsel of a defendant convicted of manslaughter has in due season presented to the lower judge his written bills of exception to the rulings of the judge on matters of law, and without any fault of the accused or his counsel the bills of exception are absent from the files of the court, a new trial will be granted, even though it appear that the application for a new trial was not made to the lower court until after an appeal had been taken.

State vs. *Bess*, *191.*

The confession of one indicted for larceny, made while in custody, and without any threat, promise of reward, or immunity from punishment, is admissible in evidence. *State* vs. *Perkins*, *192.*

Where a party indicted for murder is convicted of manslaughter, and the conviction is set aside as an absolute nullity by this court, he can not be subsequently indicted and tried for the same offense, unless the indictment is found within a year from the time the crime is charged to have been committed. A criminal prosecution which has been declared a nullity does not interrupt prescription.

State vs. *Morrison*, *211.*

CRIMINAL LAW—Continued.

Where an accused under one verdict of condemnation, is twice sentenced by the court to two punishments, to be inflicted at different places, and of different duration, the last sentence is null and void. *State* vs. *Davis*, 249.

Where the accused is charged with feloniously breaking into a store "with intent to steal" evidence is admissible to show that certain articles were actually stolen from the store at the time it was broken into and entered. *State* vs. *Woods et al.*, 267.

Whether a witness for the defense in a criminal trial who has already testified of the matter may be re-introduced in order to contradict evidence in rebuttal introduced by the State, is a matter left to the discretion of the court. *Ib.*

The allegation that "the information is defective as not being in conformity to the common-law principles established by section 976 of our Revised Statutes," is too vague to support a motion in arrest of judgment. *Ib.*

A motion in arrest of judgment in a conviction for burglary, on the ground that certain language was not used in the charging part of the information, will not be sustained, when it appears that the charge in the information would not have been increased in perspicuity by the employment of the language. *Ib.*

In an information which charges burglary committed during a certain night, it is not necessary to specify the hour of the night. *Ib.*

The prosecution of all except capital offenses may be made on information. *Ib.*

One who is being tried on the charge of murder has a right to demand that the court should instruct the jury that if they find that the deceased had previously threatened the accused with his life, or some great bodily harm, and that subsequently they met without design, and from the motions and actions of the deceased the accused was induced to believe, and had reasonable ground to believe that the deceased was about to carry his threats into execution, the accused had the right to defend himself even by killing his assailant if necessary to protect himself, and the jury should acquit, although it should afterwards appear that there was no such design on the part of the assailant. *State* vs. *St. Geme*, 302.

Although in charging the jury in a criminal case the court need not charge in the very words asked, provided a charge substantially covering every thing requested be given, it is yet error in the court to designate a perfectly legal request to charge as illegal. *Ib.*

An objection to the manner of drawing a *venire* can not be successfully made, unless made on the first day of the week for which the *venire* was drawn. *State* vs. *Johnson*, 368.

CRIMINAL LAW—Continued.

Whether certain interrogatories, objected to as leading and tending to elicit mere opinions instead of facts, should be put to a witness, is a matter that rests in the sound discretion of the court. *Ib.*

Evidence offered in defense, and not in rebuttal, in a trial for murder, to show that shortly before the homicide another party had publicly threatened to kill the deceased, when neither the party's name, nor any of the surrounding circumstances of his alleged threat is made to appear, is not admissible. *Ib.*

A remark by the judge to the prosecuting officer in a criminal proceeding warning the latter to examine the witnesses carefully in order to avoid the taking of bills of exception, can not tend to the prejudice of the accused, and therefore is not a ground for disturbing a verdict. *Ib.*

A continuance can not be demanded in a criminal case on the ground that the court was not properly organized because the acting sheriff had been elected to and was serving in another office, when it appears that the successor of the acting sheriff qualified the day the motion for the continuance was made, and acted as sheriff on the trial of the case. *State* vs. *O'Grady, 378.*

Where one of two men indicted for murder is acquitted, and the other convicted, the one convicted can not obtain a new trial on the allegation that he could prove by his co-defendant that the deceased threatened to kill him, and actually attempted to carry the threat into execution, when it appears by the terms of his own allegations that the attempts of the deceased to carry the threats into execution were not made until after the accused had inflicted the mortal wound. *Ib.*

It need not appear in the record of a criminal case that the grand jury who found the indictment were sworn. Until the contrary be affirmatively shown, it will be presumed that the grand jury were properly organized. *State* vs. *Watson, 379.*

Objections to the manner of organizing a grand jury can not be made after a plea, and trial. They should be made before pleading. *Ib.*

The verdict in a murder case will not be disturbed on the ground that the judge refused to charge that if the jury believed that when the accused did the killing he was insane from the use of intoxicating liquors or other poisons sold and administered to him by the deceased. Drunkenness does not excuse crime. *Ib.*

Where the record in a murder case fails to show that the prisoner was present at any time during the trial, or fails to show that any plea was filed by, or in behalf of the defendant, the verdict in the case will be set aside and the judgment annulled.

State vs. *Henry Revells, 387.*

CRIMINAL LAW—Continued.

An amendment of the minutes of the criminal court in any particular case, in order to show that the defendant was actually in court during the trial, may be made even after the record of appeal has been lodged in this court, provided the amendment is made contradictorily with the defendant. It can not be made *ex parte* with no notice to the defendant. *Ib.*

The clerk of the court need only take the oath of jury commissioner once during his term of office. He need not take it at every drawing of a jury. *Ib.*

The testimony of the clerk of the court is not admissible to show that he was absent from the drawing of a *venire*, when the *proces verbal* of the drawing, signed by himself, recites his presence. *Ib.*

After the judge has annulled and set aside, in one case, a whole *venire* drawn for that term, he can not afterward during that term, in another case, hold such a *venire* to be good. *Ib.*

The term of a criminal court does not lapse on account of setting aside a first *venire*, and ordering a drawing of a second one, when the court remains in session until the second *venire* is drawn, transacting such business as does not require a jury.
State vs. *Vance*, *398*.

Section eleven of the act No. 44 of the year 1877 which requires all objections to the manner of drawing *venires* to be made on the first day of the term of court, does not apply to juries drawn after the first day of the term, or to persons indicted during the term for an offense committed after the first day of the term. *Ib.*

The clerk of the court can not legally act as jury commissioner until he has taken the required oath as such ; and any *venire* he is actively instrumental in drawing before taking that oath, must be set aside.
Ib.

Where the record in a case where the defendant was prosecuted for murder fails to show that the prisoner was present at any time during the trial, the verdict in the case will be set aside, and the judgment annulled. *State* vs. *Smith*, *406*.

An amendment of the minutes of the criminal court in any particular case, in order to show that the defendant was actually in court during the trial, may be made even after the record of appeal has been lodged in this court, provided the amendment is made contradictorily with the defendant. But it can not be made *ex parte*, with no notice to the defendant. *Ib.*

The jury commissioners have no authority to draw a grand jury at any period less than fifty days before the regular time for the opening of the court term. *Ib.*

After the judge has annulled and set aside, in one case, a whole *venire*

CRIMINAL LAW—Continued.

drawn for that term, he can not afterward during that term in an other case, hold such a *venire* to be good. *Ib.*

The continuance of a case on the ground of the absence of a material witness is a matter in the sound discretion of the court, and the exercise of that discretion will not be interfered with when there is nothing to show it was unsound. *State* vs. *Finn*, 408.

Where an accused is on trial under an information for shooting with a dangerous weapon, to wit with a *pistol*, the information may be amended by substituting the word "gun" for the word "pistol." *Ib.*

The fact that while a jury in a criminal case were deliberating they informed the deputy sheriff in charge that they desired further instructions from the judge, his reply that the district attorney was absent and no further instructions could be had until his return, the consequent finding of the jury without any further instructions will not justify the granting of a new trial, when it appears that the judge as well as the district attorney was absent, when the jury's request for further instructions was made, and the jury did not repeat the request. *Ib.*

The correction of the minutes of court, so as to show the prisoner's presence at a trial, which had been declared null at his instance, and on his assignment as error the failure to mention his presence in the minutes, can have no effect upon the second trial. The final decree of this court setting aside the verdict, and annulling the judgment thereon on the ground of his presence not appearing on the minutes, is conclusive as to the irregularity of that trial. *State* vs. *Byrd*, 419.

When a judgment, rendered upon a conviction, has been vacated because the minutes did not show the defendant's presence when the verdict was rendered, such verdict and judgment can not be pleaded in defense on a subsequent trial, and do not sustain the plea of *autrefois convict*. *Ib.*

A *nolle prosequi*, and the consequent discharge of the prisoner, is not a bar to a subsequent indictment for the same offense; and where there are two counts, a *nol. pros.* of the first does not bar a prosecution on the second. So where, on an indictment for murder, the prisoner is convicted of manslaughter and a new trial is obtained, a *nol. pros.* may be entered as to the charge of murder, and a new indictment be preferred for manslaughter. *Ib.*

When, upon an indictment for murder, there is a conviction of manslaughter only, the verdict is in legal intendment an acquittal of murder, and is a bar to the further prosecution of the greater offense. *Ib.*

CRIMINAL LAW—Continued.

When, upon an indictment for murder containing a single count, there has been a conviction of manslaughter, and the judgment thereon has been annulled on appeal for irregularities in the trial, the prisoner may be subjected to another trial on the same indictment for manslaughter only, and the announcement of the prosecuting attorney, that a *nol. pros.* is entered as to the charge of murder with reservation of the right to proceed for manslaughter, means only that the jury can not consider again the charge of murder, of which the prisoner has been by legal inference acquitted, but only that for manslaughter as included in the charge of the major crime. *Ib.*

A party may be charged in separate counts, in one information, of larceny and burglary. Such an information is not vicious on the score of duplicity. *State* vs. *Depass and Baptiste, 487.*

Neither the fact that two offenses are not embraced or denounced in the same statute, nor that they have no necessary connection or similarity, will prevent them from being charged, on separate counts, in a single information. *Ib.*

The pleadings and mode of procedure of criminal prosecutions in England obtain in Louisiana, in virtue of a special statute to that effect. *Ib.*

Even after an appeal in a criminal case has been taken, the State may by a mandamus compel the lower judge to so amend and correct omissions in the minutes of the court, as to make them evidence facts admitted, or proven to have transpired during the course of the trial; as, for example, to show that the defendant was present at his trial, and conviction.

State ex rel. Ogden, Attorney General, vs. *Judge Sixth Judicial District Court, 557.*

A verdict of conviction for larceny will be set aside when it appears that the information on which the defendant was tried, and convicted, only charged that he "*attempted*" to commit a larceny. Such a sentence is not responsive to, or justified by the charge, and the defendant's objections to it may be made after the trial and conviction. *State* vs. *Womack, 635.*

An information which is "ordered" to be filed by the court, is presumed to be filed "with the consent of the court first obtained." *State* vs. *Robacker, 651.*

Where it appears that a defendant charged with larceny was represented by counsel when his case was fixed for trial, it is no ground for an arrest of the judgment in his case that he was neither present when the case was fixed, nor consented to its being fixed. *Ib.*

CRIMINAL LAW—Continued.

It is no ground of just complaint that the accused was not present at the beginning of his trial, when it appears that he was present in court when his "trial was proceeded with." *Ib.*

The want of an averment, in an information filed by a district attorney *pro tem.*, that the district attorney was absent, disabled, recused, or refused to act, is a defect which must be objected to by demurrer, or motion to quash, before trial. It can not be availed of in arrest of judgment. *Ib.*

The charge in an information that certain property was stolen in a certain parish, sufficiently sets forth the locality of the property, at the date of its theft. *Ib.*

Where an information, charging the crime of bigamy, alleges that the offense was committed more than a year before the filing of the information, but that it had not been made known to any public officer authorized to direct a prosecution, until within one year immediately preceding the filing, the burden of proof will be on the defendant to show that such knowledge was brought to an officer having authority to investigate the crime *before* the said year. *State* vs. *Barrow*, *691.*

The surety on the bail bond of one who is accused of a felony, and who is in prison awaiting sentence on a conviction of another crime, may effectively surrender the accused by a formal declaration to that effect to the sheriff, and have his bond validly canceled by the sheriff, without the necessity of going through the idle show of the sheriff leading the prisoner out of his cell, and the bail thereupon leading him back into it, and there formally delivering him to the sheriff. *State* vs. *Trahan et al.*, *715.*

If an accused person, against whom an information has been filed in the parish court, does not expressly waive a trial by jury, the information, and all the papers relating to it, must be instantly transferred to the district court which will thenceforward alone have jurisdiction of the case. *State* vs. *Adam*, *717.*

Where the affidavit supporting a motion for a new trial on the ground of newly discovered evidence, appears to be based on a rumor, and no pains were taken to bring forward the newly discovered witness at, or before the hearing of the motion, the motion is properly overruled. *Ib.*

A verdict that the accused is "guilty as charged," is responsive to the charge, if the crime is charged as the law directs or permits. *Ib.*

Where a clause of the criminal law enumerates several offenses linked to the same act, or enumerates, disjunctly, the intent necessary to

CRIMINAL LAW—Continued.

constitute each of the offenses, such offenses may be cumulated in one count. *Ib.*

A service of the duly certified list of the jurors for the term at which the accused was tried, made on the accused during that term, and made two weeks before his trial, is a sufficient compliance with the law requiring such service to be made two days before the trial.
Jack vs. *Toby*, 756.

A defendant on trial for burglary and grand larceny, has no right to introduce in evidence his own voluntary statement taken before the magistrate. Decision in State vs. Vandergriff, 23 A. 95, affirmed.
Ib.

This court will not review or pass on the ruling of the lower court in a criminal case, either in receiving or rejecting testimony, except where the objections and ruling are set forth in a formal bill of exceptions. *State* vs. *François Dufour*, 804.

Proof that one accused of murder escaped and fled from justice, after arrest for the crime charged, is admissible. *Ib.*

The voluntary declaration of one charged with murder, received by the committing magistrate, is not admissible in evidence in his favor on the trial. *Ib.*

Arrest of judgment in a criminal case will not be allowed on the ground of a want of qualification of the jury commissioners. Such an objection must be made in the preliminary stages of the trial.
State vs. *Sanford Miles*, 825.

Where a prisoner was indicted and tried for murder, and the jury found him guilty of manslaughter, he can not, on a new trial obtained by him, be tried again for the crime of murder. The obtention by the accused of a new trial as to the verdict of manslaughter can not be considered as a waiver of the right to the plea of *autrefois acquit*, *quoad* the charge of murder.
State vs. *Jeff Dennison alias Jeff Denis*, 847.

On the trial of an accused for carrying a pistol concealed on his person, evidence to show that the pistol belonged to another; that the owner placed it in the hands of the accused merely to get cartridges for it, and that the accused had no pistol, and had never been known to carry one, is not admissible. *State* vs. *Sandy Martin*, 847.

A person may be legally prosecuted and condemned for murder under an indictment found within one year from the death of the deceased. The prescription of one year, applicable to such cases, begins to run from the death of the deceased and not from the infliction of the wound resulting in the death, or the date of the arrest of the accused. *State* vs. *Thos. Taylor*, 857.

CRIMINAL LAW—Continued.

The conversations of an accused, on trial for murder, after the alleged killing, with a person jointly indicted for the murder, are not admissible in evidence when the indictment did not charge conspiracy.

State vs. *Carroll*, 860.

This court can not express an opinion as to the weight and nature of testimony in a criminal case; more especially when the testimony is not before it. *Ib.*

CURATOR AD HOC.

A curator *ad hoc* can validly acknowledge in writing service of petition and citation addressed to him as such, and such acknowledgment brings the defendant into court, and interrupts prescription.

Bartlett vs. *Wheeler*, 540.

DAMAGES.

Where in a suit for damages against a railway company on account of injuries caused by a collision it appears that the negligence of the injured party contributed to, and was mainly the cause of the disaster, no recovery can be had by him or his legal representatives, even though it be in evidence that the servants of the company were in some degree to blame for the accident.

Ellen Murray vs. *Pontchartrain R. R. Co.*, 490.

Where a simulated sale has been set aside at the suit of a creditor of the pretended vendor, the creditor can not hold the pretended vendee in damages on account of a depreciation of property, arising after the pretended sale, when he fails to show that the simulated conveyance caused the depreciation.

Gardiner vs. *Succession of Scherer*, 527.

The plaintiff and his surety in an injunction suit, restraining the execution of an order of seizure and sale, can not be held liable in damages, except by an action on the bond. *Dejean* vs. *Hebert*, 729.

DISTRICT ATTORNEY.

A district attorney has a certain discretion as to how, when, and whom to sue in the name of the State. In a contest for the possession of an office under the Intrusion Act, he may, in his discretion, join either of the contestants as a party plaintiff, and the contestant whom the district attorney has refused to join as plaintiff, but offered to join as defendant in the suit, can not, on that ground, maintain a claim for damages against the district attorney.

Farrar vs. *Steele*, 640.

See O'Connor vs. Parish of East Baton Rouge, 221.

DONATIONS.

Where real estate is purchased by A, and actually is and continues to be his, but the title to which is taken in the name of B, and A gives

DONATIONS—Continued.

a letter of secret instructions to B, in virtue of which B, after the death of A, transfers the property to C who consents to disburse a part of the revenues of the property to carry out certain lawful purposes of A set forth in his secret instructions, the heirs of A may nevertheless recover from B and C the property thus conveyed or the value thereof. The letter of instructions, having no authentic form, can not be construed as a donation *inter vivos*, and there being no proof of its having been designed as an olographic will, it follows that the property which was sought to be disposed of by it remained a part of A's succession.

Maduel, Executor, vs. *Tuyes*, 483.

The method for contesting an election pointed out by the various sections of the Revised Statutes of 1870, from section 1421 to 1435 has not been repealed. *Knight* vs. *Ragan*, 289.

A contested election suit is not amenable to the exception of prematurity when instituted before the Secretary of State has promulgated the result of the election. *Ib.*

Secondary evidence will not be admitted in support of a charge of forgery to prove the contents of the original tally-sheets, or returns of commissioners of election, until the non-existence of those tally-sheets has been shown. *Ib.*

ESTOPPEL.

A voluntary party to an executed contract who has reaped and retained the profits of it, is estopped from assailing it as fraudulent.

Byrne vs. *Hibernia National Bank*, 81.

One who claims the proceeds of a judicial sale, thereby makes a judicial admission that the sale was valid. He is therefore estopped from attacking the sale as a nullity, unless he proves that his admission was made through error of fact.

Factors' and Traders' Insurance Company vs. *DeBlanc et al.*, 100.

One who judicially asserts a fact as the basis of a right touching the matter in controversy, can not afterwards change his position, and assert the contrary. *Ib.*

Where the plaintiff in a suit formally avers that the defendant had collected certain warrants, the property of plaintiff, and prays the defendant's condemnation for the amount of the warrants, he thereby estops himself from subsequently suing another person as the collector of the warrants.

Board of School Directors of Concordia Parish vs. *Hernandez*, 158.

A party who formally declares in his pleadings that he has a certain claim due by and exigible against a certain fiscal fund, and that alone,

ESTOPPEL—Continued.

and provokes a judicial decree affirming his claim, will not be heard, in a subsequent suit, to ask that the State be adjudged the debtor of his claim.

Louisiana Levee Company vs. *State of Louisiana*, 250.

Where a party in one suit avers the validity of a judgment of separation of property procured by a wife, in order to obtain a judgment against her, he is thereby estopped from afterward contesting the validity of the separation in order to execute the judgment thus obtained. *Hardie* vs. *Turner, Wilson & Co.*, 469.

The keeper or owner of a warehouse who has collected, on behalf of the authorities of a municipal corporation, a certain tax, levied by the corporation on packages of goods consigned to him, is estopped, when sued by the corporation for the amount of the tax, from setting up a want of authority in the corporation to impose the tax.

Board of Trustees of New Iberia vs. *L. P. Serrett*, 719.

The dismissal of a rule taken by a mortgage creditor in one court, to distribute the proceeds of the mortgage property which had been seized and sold under the process of another court, will not estop him from proceeding in the latter court to effect the distribution, the dismissal of the rule not having the force of *res adjudicata*.

Reine vs. *Jack*, 859

See Nolan vs. Succession of New, 552.

See Hood vs. Frellsen, 577.

In re Mechanics' Society, 627.

EVIDENCE.

Under the plea of the general issue, the defendant may prove any fact or circumstance which tends to show the non-existence, or falsity of the facts alleged by the plaintiff.

Byrne vs. *Hibernia National Bank*, 81.

A duly certified copy of an original record, made by the legal custodian of the original, is admissible in evidence.

Board of School Directors of Concordia Parish vs. *Hernandez*, 158.

Verbal evidence is not admissible to contradict, or vary the declarations, stipulations, admissions, or receipts contained in a written policy of insurance, when the contract is not assailed for error, fraud, or violence.

Trager vs. *Louisiana Equitable Life Insurance Co.*, 235.

The letter of one who has signed a receipt, written on the same paper as the receipt, and with special reference to it, is admissible in evidence to explain the receipt. *Perry* vs. *Burton*, 262.

Parol evidence offered by a defendant in explanation of an alteration in a receipt signed by him, which is responsive to the averments of his answer, and relevant to the explanation, is admissible. *Ib.*

EVIDENCE—Continued.

Where the sale of succession property is attacked on the ground of a fraudulent collusion between the administrator and the creditor who provoked the sale, parol evidence is admissible to show that the property sold for what it was worth.

Heirs of Herriman vs. *Janney*, 276.

Where the plaintiff in a sequestration suit has been *nonsuited*, the surety on the sequestration bond, when sued by the defendant for damages, has a right to introduce evidence to show that the property sequestered did not belong to the defendant.

Lacoste vs. *Duvie*, 367.

The recital of an order of court in a sheriff's return is not a sufficient proof of the order. *Germaine, Tutrix*, vs. *Mallerich*, 371.

The record of a wife's suit for a separation of property may be introduced in evidence in a suit subsequently brought by the husband's creditor to annul the judgment of separation merely to show that such a judgment was rendered, but the parol evidence on which the judgment was obtained is not admissible in the suit to annul. The burden of proof in such a suit is on the wife, to prove *aliunde*, that her judgment was fairly obtained.

Darcy & Wheeler vs. *Labennes and Wife*, 404.

Where the ownership of property is claimed on the ground of continuous, peaceable possession as owner for thirty years, on the part of the claimant and his authors, the claimant is entitled to introduce in proof of his title, a declaration made by his vendor in an act of sale to him of contiguous property, to the effect that he (the vendor) had been in peaceable possession of the property presently in question, and that he transferred to the claimant the rights which he, or his preceding vendors had in the property in question.

Durel et al. vs. *Tennison*, 538.

Such claimant is also entitled to introduce parol proof to show that both he and his vendors and authors had possessed during the time, and under the conditions required for the prescription of thirty years.

Ib.

Parol evidence is admissible to prove the interruption of prescription.

People's Bank vs. *Girod, Wife, etc.*, 592.

A certified copy of a marriage license from another State of the Union, certified by the clerk of the court, who is also judge of the court, as a copy from the records of his office, and also certified by him, as judge, declaring the attestation to be in due form, and having the seal of the court affixed to it, is in due form, and admissible in evidence. *State* vs. *Barrow*, 691.

The proof that certain letters were written by the defendant may be made by a comparison of the handwriting. *Ib.*

EVIDENCE—Continued.

A verdict of a jury will not be set aside because of ill-timed remarks of the judge, in his charge to the jury, when the remarks contain no error of law, and no comment on the facts. *Ib.*

Where a defendant is tried on a charge of bigamy, the onus of proof is on him to show, as a matter of defence, that his wife had absented herself for the space of five years before his second marriage, and that he had not known she was living within that time; or that he had been divorced by competent authority at the time of his second marraige; or that his former marraige had been declared void by competent authority. *Ib.*

The *prima facie* proof of an account, carries with it that of an item of credit on the account, without which the account would be prescribed. *Succession of Dinkgrave, 703.*

The husband of one of the heirs of a sucession, can testify for or against a co-heir, for or against a creditor of a co-heir, touching the latter's interest in the succession. *Ib.*

Boisse and Husband vs. *Dickson, Administratrix, et al., 741.*

In a suit which seeks to subject to seizure the interest of an heir in a succession, a receipt of the heir acknowledging that she had been paid in full for her interest, although not full proof as against third persons, is yet relevant, and therefore admissible in evidence. *Ib.*

In the absence of allegation and proof to the contrary, it will be presumed that the ordinances of a police jury which authorized the construction of necessary public works, provided for the payment of the debt thus incurred, as required by law.

G. B. Shields vs. *Pipes, Tax Collector, 765.*

Renunciations of rights are not to be presumed.

Powell vs. *Hayes et al., 789.*

The creditor of one who has made a simulated sale of his property has a right to prove the simulation by parol evidence. He is not restricted to a *counter letter*, as a means of proof.

Testart vs. *Belot et al., 795.*

Where it is alleged that the holder of a note is not its owner, that it was passed to him for the purpose of suing on the same, thus alleging in effect that he is a party interposed to defeat the plaintiff's claim, evidence is admissible to prove the non-ownership. *Ib.*

See Gordon vs. Knox, 284.

See Knight vs. Ragan, 289.

See Succession of Dinkgrave, 703.

See Auge vs. Variol, 865.

EXCEPTIONS.

See Practice and Pleading.

EXECUTIONS.

Where writs of *fi. fa.* for the collection of city taxes were issued by the Superior District Court for the parish of Orleans, and not returned before that court was abolished, they did not become extinct thereby. It was not necessary or proper to return such writs, in order to obtain *aliases* from the Third District Court, to which all the pending cases in the Superior District Court were transferred.

Bellocq vs. *City of New Orleans*, 471.

Under a judgment and execution for taxes the first writ of *fi. fa.* issued in the case continues in force until finally satisfied.

Elder vs. *City of New Orleans et al.*, 500.

In the parish of Orleans the seizure of property under a *fi. fa.* issued in execution of a judgment for taxes is constructive. It takes effect by merely recording the notice of seizure in the mortgage office, and such seizure can not be affected by an omission of the sheriff to state on his return the "date and hour" of the registry of the notice. *Ib.*

In the absence of contrary proof it will be presumed that the sheriff properly recorded the notice of seizure in the mortgage office. *Ib.*

It is a sufficient description of property seized and sold under a judgment for taxes that it is situated in a certain district, and square, bounded by four certain streets, and measures so many feet in depth by so many feet in width. *Ib.*

The execution of a judgment of this court directing the police jury of a parish to levy a certain tax, can not be affected by a subsequent act of the Legislature, limiting the power of police juries to impose taxes. *Duperrier* vs. *Police Jury of Iberia Parish*, 709.

In order to make a valid seizure and sale of the undivided interest of an heir in a succession, it is not necessary to reduce to possession any specific property of the succession.

Boisse and Husband vs. *Dickson et al.*, 741.

If the return of the sheriff, or marshal, shows a seizure of the whole interest in the succession, and his advertisement for sale of the interest includes a complete list of every article of property and every right included in the inventories of the succession, it is sufficient. *Ib.*

The seizure of the interest of an heir in a succession can not embrace that portion of her interest which the heir has previously received and disposed of. *Ib.*

The growing crop of a lessee is, as to him, a movable, and hence is subject to be seized and sold by a judgment creditor of the lessee. 31 A. 245.

Pickens vs. *Webster, Sheriff, and Schmidt & Ziegler*, 870.

EXECUTORY PROCEEDINGS.

See Seizure and Sale.

EXEMPTION FROM TAXATION.

See Taxation.

EXPROPRIATION.

Where in a suit brought by a railroad corporation against the owner of land for the expropriation of a right of way the plaintiff claims under existing laws the full ownership of the land, and the defendant does not by his answer deny the right of full ownership, but merely disputes the amount of land claimed, a judgment may be properly rendered recognizing the title in fee claimed by plaintiff. *N. O. Pacific Railway Co.* vs. *E. H. Gay, Tutor*, 430.

In determining the amount of damage an owner of land suffers by an expropriation of a part of it in favor of a railroad company the enhanced value of the balance of the land, caused by the building of the railroad, should be allowed as an offset to the damages. *Ib.*

The Boards of Drainage Commissioners of the various districts under the act No. 165 of 1858 are authorized to enter on any private land and dig and construct any canal that may be useful or necessary to drain and reclaim the land in those districts, subject to claims for compensation on account of any damage caused by such canal to the owners of the land on which it is dug.

Jefferson and Lake Pontchartrain Railroad Company vs. *City of New Orleans*, 478.

Where the owner of land, being fully apprised of the projected canal, fails to have his compensation for damages fixed, as provided for by section four of the act of 1858, before the work is begun, and makes no opposition to the completion of the canal, he thereby forfeits his claim to previous compensation, and all right to an injunction on the use of the canal. *Ib.*

FACTORS.

See Agency.

FRAUD.

See Contracts.

FREE-SCHOOL BONDS.

The sale of bonds constituting a part of the assets of the "free-school fund," made in virtue of act No. 81 of 1872, was utterly null and void, and conferred no title on the purchaser, and no future assignee of the purchaser, who took the bonds in good faith, for value, and before their maturity, could acquire a title to them.

Sun Mutual Insurance Company vs. *Board of Liquidation. Secretary of State and Auditor Intervenors*, 175.

FREE-SCHOOL BONDS—Continued.

Bonds that are a part of the assets of the "free-school fund" are consigned by law to the custody of the Secretary of State and Auditor of Public Accounts, and those officers have a right to claim their possession in whatever hands they may be found. And this right is not affected by the prescription of three years. *Ib.*

GARNISHMENT.

All rules or proceedings to traverse, or disprove the answers of a garnishee, either under a writ of attachment, or *fieri facias*, are prescribed after twenty judicial days from the filing of the garnishee's answers.

Garcia y Leon vs. *Louisiana Mutual Insurance Company*, 546.

The answer of a garnishee confessing that he had property of the defendant in his hands, but claiming a right of pledge on it, standing unimpeached and contradicted, must be received as a whole. It may be disproved, but can not be arbirarily divided.

Auge vs. *Variol*, 865.

HOMESTEAD.

If the widow, or any *one* of the minors, possess in his or her own right $1000, nothing can be allowed under the homestead law.

Succession of Elliott, 31.

A homestead can not be located on land held in indivision.

Cole vs. *La Chaumbre et al.*, 41.

A married woman who has no family dependent on her individually for support, and whose husband is in good health, attends to his ordinary avocation, and owns more land than the law exempts from seizure, can not claim the benefit of the homestead act of 1865.

Elizabeth M. Taylor vs. *Acquilla McElvin et al.*, 283.

The house and grounds situated in the outskirts of an unincorporated town, which belong to a debtor who resides on the premises, and who has a wife and children dependent on him for support, and whose wife has less than $500 worth of property, are exempt from seizure under the provisions of the homestead law.

A. H. Singletary vs. *J. R. Singletary, Sheriff, et al.*, 374.

HYPOTHECARY ACTION.

See Action.

IMPRISONMENT FOR DEBT.

See Arrest of Debtor.

INJUNCTION.

The fraudulent possessor of a note may be enjoined by its legal custodian from using the note as evidence in a suit brought on it by the the fraudulent possessor. *Lannes* vs. *Courege et al.*, 74.

INJUNCTION—Continued.

An injunction will not issue to restrain the doing of a thing which has already been done, which is an accomplished fact.

Trevigne vs. *School Board and W. O. Rogers*, 105.

On the application for an injunction no mandate can issue to enforce rights claimed by the plaintiff which he does not ask shall be enforced. *Ib.*

A proceeding in execution of a judgment of this court which is not in conformity with the terms of the judgment, may be enjoined.

Labauve vs. *Slack*, 134.

When a decree dissolving an injunction with damages does not expressly condemn the surety on the injunction, a separate suit may be instituted on the injunction bond by the defendants in injunction, to recover of the surety the amount of the damages.

Howell et al. vs. *Cronan et al.*, 247.

The writ of injunction will issue on the *ex parte* application of the complainant, only in its prohibitory or remedial form; as in cases where the only purpose to be accomplished is to restrain, or prohibit something from being done. But in its mandatory form, when it commands the doing of something, it can not be issued until a hearing on the merits; or when, a prohibitory writ having issued, restraining a party from obstructing the exercise of a right, the obstruction may be commanded to be removed because its continuance effects the very injury he was prohibited from effecting.

Black vs. *Good Intent Tow-Boat Co.*, 497.

The affidavit of a party praying for an injunction that "all the facts above set forth as bases of an injunction, and reasons why an injunction should issue are true and correct" is insufficient.

Elder vs. *City of New Orleans et al.*, 500.

It is only when an injunction has been taken to restrain the execution of a money judgment, that the principal and surety on the bond may be summarily condemned *in solido*. *Ib.*

A resident of the city of New Orleans engaged in an occupation which subjects him to a license tax imposed by the city, has no right to an injunction to restrain the city from collecting the license, and enforcing the penalties prescribed for its non-payment. On the other hand the city may enjoin him from carrying on his business until his license is paid, and such an injunction, sued out by the city, can not be dissolved on bond.

City of New Orleans vs. *Becker*, 644.

A third possessor of property who has bought it subject to a mortgage containing the pact *de non alienando*, and who has assumed the payment of the mortgage debt as a part of the purchase price, can not enjoin the executory proceedings of the mortgage creditor, on

INJUNCTION—Continued.

the ground that he had paid, under a special agreement with the creditor, usurious interest to the latter, and hence that all interest was forfeited, which would have applied the payments made on interest account to the principal, and thus extinguished the debt. Nor can such an injunction found on the ground that the excess of interest paid over and above that allowed by law, should have been credited on the principal of the debt, and thus made the sum due less than that claimed in the executory proceedings.

Mullin & McGowen vs. *Hart, Sheriff*, 677.

An *ex parte* order of court, granted on the application of an executrix, commanding the sale of succession property in order to effect a partition between the executrix, who has an undivided interest in the property, and the heirs, will be set aside, and the sale of the property enjoined on the petition of the heirs who, in consequence of the *ex parte* order, and the sale to be made under it, would be deprived either of their legal right to ask for a partition in kind, or, otherwise, of retaining until a final settlement the price of any of the property they might purchase, at a sale of it made exclusively to effect a partition.

State ex. rel Moore vs. *Parish Judge of St. Landry*, 802.

SEE BERENS VS. EXECUTOR, 112.

SEE GOLDSMITH VS. NEW ORLEANS, 646.

SEE WILLIAMSON VS. RICHARDSON, 685.

INSOLVENCY.

Where on the application of a debtor for a respite, the question in dispute is whether or not the respite has been refused, the appointment of a provisional syndic before the decision of that question is premature; and the debtor is entitled to a mandamus, to compel the lower judge to grant a suspensive appeal from the order of the court making such appointment.

State ex rel. L. E. & E. F. Herwig vs. *Judge of the Third District Court*, 800.

INSURANCE.

A life insurance policy taken out by a father in favor of his children is not *ipso facto* extinguished by the failure of the assured to pay the first maturing premium note, taken by the assurers in place of the cash payment required by the policy merely because of a verbal agreement on the part of the assured, not referred to either in the note or the policy, made without the assent of the beneficiaries of the policy, and after the delivery of the policy to him, that he would surrender the policy on failure to pay the said premium note at its maturity.

Mrs. Julia Trager, Tutrix, vs. *La. Equitable Life Ins. Co.*, 235.

INSURANCE—Continued.

So long as a life policy in favor of third persons remains in the hands of the assured, and the latter's premium notes are retained by the assurers, and the assurers take no legal action to dissolve the contract, the contract continues to be binding. *Ib.*

Where the stipulation of a life policy is that the assurers shall not pay the amount of the policy until ninety days after notice and proof of the assured's death, and it appears that due notice of death was not given the assurers, they will be liable for interest only from judicial demand. *Ib.*

INTERDICTION.

The interdiction of a person will not be pronounced on the evidence of two medical experts, neither of whom had ever conversed with him until the day before the filing of their report of his condition, and who had had no opportunity to test his mental condition.

Interdiction of Scott Watson. Intervention of Mrs. Weatherly et al., 757.

Mere weakness of mind in the defendant will not warrant a decree of interdiction when such a decree is not asked for by any of his relatives, and when, in view of the evidence adduced, it does not appear that the interdiction is necessary, either for the protection of his person, or his property. *Ib.*

INTEREST.

In the absence of proof of demand, interest on a debt due by a deceased former tutor, either as *negotiorum gestor*, or under a tacit mandate, only begins to run from date of his death.

Succession of Romero, 721.

See Trager vs. La. E. L. I. Co., 235.

INTERVENTION.

See Practice and Pleading.

JUDGES.

In the absence of the Judge of one of the District Courts of the parish of Orleans, another district judge of that parish may grant an appeal from a judgment rendered by the absent judge.

Mrs. Widow J. C. de St. Romes vs. *the Levee Steam Cotton Press Co., 224.*

JUDGMENT AND NULLITY OF.

Judgments rendered by this court while holding one of its country terms only become final on the expiration of three judicial days from their rendition. *State ex. rel. Fairchild* vs. *Stillman, 162.*

An action for the nullity of a judgment on account of matters in existence and known to the plaintiff when the suit was instituted in which the judgment was rendered, can not be maintained.

Succession of Lebrew, 212.

JUDGMENT AND NULLITY OF—Continued.

The fault of a co-defendant is not a ground for annulling a judgment. *Ib.*

Where it appears that after an open and public trial of a cause judgment was rendered against the plaintiff, and that he made no application for a continuance on account of surprise, and did not ask for a new trial, and abandoned the appeal he had taken, he can not maintain an action to annul the judgment on the ground that it was rendered on false documents, whose existence was known to him before the trial of the first suit, and on the false testimony of a witness whom he made no effort to contradict, or in any way to discredit. *Perry* vs. *Rue*, 287.

Where it does not appear by an authentic act that the wife's rights and claims under her judgment of separation of property have been paid, and where the evidence shows that the first writ of *fi. fa.* in execution of her judgment was issued four years after the judgment was rendered, the judgment will, on proper application, be set aside as null and void. *Darcy & Wheeler* vs. *Labennes and Wife*, 404.

The reception of secondary or illegal evidence in proof of a fact is no ground to annul a judgment upon, when the evidence was not objected to. *Elder* vs. *City of New Orleans*, 500.

The judgment making absolute a rule taken by a purchaser of property at sheriff sale, to have certain mortgages and privileges on the property erased, is a definitive judgment, and must be signed by the judge. *Jacob* vs. *Preston*, 514.

Where by a clerical error in writing up the judgment, another and strange name is substituted for that of the condemned defendant, no valid execution can issue against the real defendant, so long as the error is uncorrected. But it is in the power of the plaintiff, while his judgment is alive, to have the error corrected by a mere motion taken contradictorily with the defendant. *Shelly* vs. *Dobbins*, 530.

A discharge in bankruptcy is a good defense, if pleaded and proved before judgment. It is no ground on which to annul a judgment. *Goodrich* vs. *Hunton*, 582.

This court can not alter, or modify its judgment, because an alleged agreement between the parties, suggested for the first time on an application for a rehearing, will, in consequence of the judgment, work injustice to one of the parties. *City of New Orleans* vs. *Rhenish Westphalian Lloyds et al.*, 781.

An order of court rendered in chambers can not operate to forfeit the charter of a corporation when the issue of forfeiture, *vel non*, was put in question by the answer. *Desobry* vs. *Tête*, 823.

JUDGMENT AND NULLITY OF—Continued.

A judgment which decides the issue formally raised by the pleadings is not premature because the case is remanded to ascertain the amount due under the judgment. *Augé* vs. *Variol*, 865.

SEE VICKERS VS. BLOCK, BRITTON & CO., 672.

JURISDICTION OF COURTS.

SEE COURTS.

JURISDICTION OF SUPREME COURT.

SEE APPEAL.

JURY.

On matters of fact, this court will not disturb the finding of a jury unless it is manifestly erroneous.

N. O. Pacific Railway Co. vs. *Gay, Tutor*, 430.

Where application for a jury is made at one term of the court, and overruled by the court, and properly overruled, because the party who made the application did not comply with the order of court to make the deposit for jury fees on the day of the application, the deposit of the jury fees before the trial of the case at a subsequent term of the court, without there having been a new application for a jury, will not entitle the party to a jury.

J. W. Green, Receiver, etc., vs. *J. W. Locke et al.*, 656.

LAWS.

The title of the act of the Legislature No. 71 of the year 1852, in virtue of section 37 of which the bonds of the city of New Orleans, known as the consolidated bonds, were issued, sufficiently indicates the purpose of the act.

State ex rel. Southern Bank vs. *Pilsbury, Mayor, et al.*, 1.

The taxes imposed by section 37 of that act on real estate and slaves to meet the annual interest on the consolidated bonds of the city, and provide a sinking fund for their redemption, are not equal and uniform, and hence are unconstitutional. *Ib.*

The first section of act No. 45 of 1876, fixing the terms of the District Court for the Second Judicial District Court, is constitutional.

State vs. *Daniel*, 91.

The clause in the general appropriation bill of 1871, (act No. 72) providing for the re-imbursement of moneys paid into the State treasury through error, etc., is too general in its terms to allow a court to declare that it included a particular sum which had been paid into the treasury through error by a certain person whose name does not appear in the act.

State ex rel. Bartlette vs. *The Board of Liquidation*, 273.

The act of incorporation of the St. Anna's Asylum exempting certain property from taxation, did not import a contract which inhibited

LAWS—Continued.

any subsequent Legislature or Constitutional Convention from annulling or repealing the exemption therein provided for.

City of New Orleans vs. *St. Anna's Asylum*, 292.

A special law granting to a corporation a certain privilege or franchise, and which contains no express repealing clause, does not restrict or impair the operation of an existing general law which reserves to the Legislature the power to revoke the franchise. *Ib.*

Act No. 30 of the extra session of the Legislature of 1870 creating a new charter for the city of New Orleans, authorizes the city to issue writs of provisional seizure for unpaid licenses, and that act is not unconstitutional. *City of New Orleans* vs. *Waggaman*, 299.

Where the title of an act is "to change the boundary of the parish of St. Bernard," it sufficiently indicates the purpose of the act when that purpose is to take from another parish a part of its territory and add it to the parish of St. Bernard. The title need not set forth the means by which the purpose of the act is to be accomplished.

S. W. Hammond vs. *E. Lesseps et al.*, 337.

Section 145 of the Revised Statutes of 1870 has not been repealed by any subsequent general laws on the subject of taxation.

Wintz vs. *Girardey et al.*, 381.

A law which commutes the taxes on property not actually used for church, school, or charitable purposes, by authorizing the payment of a small stated sum in place of taxes is as much a violation of the constitution as if it wholly exempted the property from taxation.

Louisiana Cotton Manufacturing Co. vs. *City of New Orleans*, 440.

Act No. 33 of the Legislature of 1861, amending act No. 165 of the year 1838 is not unconstitutional.

Jefferson and Lake Pontchartrain Railroad Company vs. *the City of New Orleans*, 478.

The title of the law enacted by the Legislature of 1878 (Sess. Acts, p. 152), authorizing the city of New Orleans to regulate private markets, etc., sufficiently expresses the object of the law.

The State vs. *J. L. Gisch*, 542.

The act of the Legislature of 1877 reviving the charter of the New Orleans Mechanics' Society operated as a waiver, on the part of the State, of all penalties incurred by the society on account of their having failed to comply with the conditions imposed on them by their charter of incorporation, and estops the State from claiming an enforcement of those penalties.

In the Matter of the Mechanics' Society, 627.

A State law authorizing the police juries of the parishes to prohibit the sale of intoxicating liquors on Sunday, does not violate that clause

LAWS—Continued.

of the Constitution of the United States which forbids the enactment of laws impairing the obligations of contracts. Nor does it violate article 110 of the constitution of this State, which forbids the divestiture of vested rights, etc.

The State vs. *J P. Bott*, *663.*

The title of the act known as the "Sunday law," passed by the General Assembly of 1878 (Sess. Acts. p. 135) sufficiently indicates the object of the law. *Ib.*

The power to regulate and prohibit the sale of liquors, conferred by the Act of 1878 on the police juries, extends to all incorporated towns and villages, and no town will be allowed to claim exemption from the operation of the act, by assuming the designation of "city." *Ib.*

The act of the Legislature of 1879, imposing license taxes, does not violate the constitution. *Walters* vs. *Duke*, *668.*

The law requires that an attachment bond should be for a sum one half more than the amount claimed by the plaintiff.

Yale & Bowling vs. *John T. Cole*, *687.*

Where the bond given by a plaintiff in attachment is for a sum as much as fifty-seven dollars less than the amount required by law, he can not invoke the rule *de minimis*, and his attachment must be set aside. *Ib.*

Where a valid judgment against a police jury orders the latter to levy and collect a tax sufficient to pay the amount called for by the judgment, in accordance with the law then in existence authorizing the police jury to impose such a tax, a subsequent act of the Legislature repealing the law authorizing the said tax, and substituting another law which makes no provision for paying the judgment, which is still partly unsatisfied, divests the vested rights of the judgment creditor, and is therefore unconstitutional.

Shields vs. *Pipes, Tax Collector*, *765.*

An act of the Legislature which declares that no municipal corporation shall assess any license-tax on certain persons over $500, and prescribes that the act shall take effect from and after its passage, can not be construed as retroactive. It applies only to the future assessments of such a tax, and hence does not repeal any municipal ordinance assessing a larger tax, which was enacted by the corporate authorities before the passage of the legislative act. Statutes will always be construed as prospective in their operation, unless their language constrains a contrary construction.

City of New Orleans vs. *Rhenish Westphalian Lloyds et al*, *781.*

A law exempting the shares of stockholders and all the other property

LAWS—Continued.

of a corporation from taxation, except its real estate, is unconstitutional.

City of New Orleans vs. *Louisiana Savings Bank and Safe Deposit Co*, 826.

A law imposing on a corporation the payment of the taxes on its stock by its shareholders is constitutional. *Ib.*

SEE CITY OF NEW ORLEANS VS. LOUISIANA SAVINGS BANK, 637.

LEGISLATURE, POWER OF, ETC.

One Legislature can not impose restrictions on the powers of a municipal corporation which a future Legislature can not modify or abrogate, except where a vested right, or the obligation of a contract might be thereby divested or impaired.

State ex rel. Southern Bank vs. *Pilsbury, Mayor, et al.*, 1.

The Legislature is without authority to pass a law reducing the salary of a judge during his term of office.

State ex rel. C. E. Moss vs. *A. Jumel, Auditor*, 142.

LESSOR AND LESSEE.

A lessor may consistently demand in one action the dissolution of the lease, and rent up to the moment the defendant surrenders possession of the leased property. *Fox* vs. *McKee*, 67.

Where a lessee contracts to pay five per cent attorney's fee on the amount of the rent for the whole term of the lease, in case it becomes necessary for the lessor to sue, and the lessor subsequently sues for and obtains a decree dissolving the lease, the lessee can be held for only five per cent attorney's fee on the rent which had accrued at the time the dissolution of the lease took effect. *Ib.*

A lessor may in one action sue his lessee on two separate leases of two pieces of property, and may provisionally seize any effects on the two premises subject to his privilege. *Ib.*

The failure of a lessee to pay the rent agreed on at the time stipulated in the lease, authorizes the lessor to demand a dissolution of the lease. *Ib.*

Before a lessee can recover damages for any disturbance of his possession or enjoyment of the leased property by a third person, he must give personal, formal notice to the lessor of the disturbance, and call the latter in warranty. *Ib.*

Mere failure to pay an installment of rent the day it is exigible will not warrant a provisional seizure when it appears that the accrued rent was tendered a day or two after it was due, and before the writ of provisional seizure issued. *Ib.*

For a wrongful provisional seizure of his effects, a lessee may recover only such damages as he shall prove he has suffered in consequence of the seizure. *Ib.*

LESSOR AND LESSEE—Continued.

Seizing the movables of a lessee of a plantation under a provisional seizure before the end of the year for for which the place was leased will not prevent the lessor from recovering rent for the whole year, when it appears that the possession of the land by the lessee was not divested by the seizure. *Thomas* vs. *Dundas*, 184.

The mere assent of a lessor to a sublease made by the lessee does not have the effect of releasing the lessee and substituting the sub-lessee in his place. *Succession of Stone*, 311.

The lessor is entitled to recover from the succession of the lessee, on account of rent due for the unexpired years of the lease, only what balance of that rent shall remain after deducting from it eight per cent per annum thereof. *Ib.*

LICENSE.

See Taxation.

LIQUIDATOR.

See Partnership and Corporation.

LA. LEVEE COMPANY.

The claim which the Louisiana Levee Company has for work done in constructing, maintaining, and repairing levees, under the act No. 4 of the Legislature of 1874, and subsequent acts amendatory thereof, is a debt, not against the State of Louisiana, but against and payable out of the fund created by said act No. 4, and known as the "levee construction fund," which fund is composed of taxes assessed for levee purposes.

La. Levee Co. vs. *State of Louisiana*, 250.

The act of the Legislature, No. 139, extra session of 1877, authorizing plaintiffs to bring this suit, does not give them any rights or claims against the State not previously possessed by them, and by suing under that act they are concluded by its terms. *Ib.*

MANDAMUS.

A mandamus will not issue to compel the Auditor to warrant on a certain fund unless it be shown that the money appropriated to that fund has not been exhausted.

State ex rel. Moss vs. *Jumel*, 142.

A mandamus will not lie to compel a religious society to restore to its membership one who had been expelled by a decree of the legally constituted church judicatory, on account of an alleged violation of some one or more of the laws of the society. The civil courts will not revise the ordinary acts of church discipline, or the administration of church government.

State ex rel. Soares vs. *Hebrew Congregation Dispersed of Judah*, 205.

MANDAMUS—Continued.

Where the police jury of a parish, in obedience to a judgment of court in favor of a certain party, levy a tax to satisfy the judgment, the party will not be entitled to a mandamus to compel the jury to levy another tax to satisfy the judgment, because the partial collections from the first tax were insufficient, until he shall have proceeded against the tax collector to compel him to collect the whole of the assessment and levy of the first tax.

Dupérier vs. *Police Jury of Iberia Parish*, 709.

The President of the Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College can not be compelled to warrant on any fund to pay a debt of either of the two former corporations, known respectively as "the Louisiana State University" and "the Agricultural and Mechanical College."

State ex rel. Schorten, Agent, vs. *President Board of Supervisors, etc.*, 711.

A mere stated account between the Superintendent of the Louisiana State University and Agricultural and Mechanical College, and one of the Professors employed in that institution, signed by the Superintendent, is not such conclusive proof of the amount due the Professor as would enable the latter to mandamus the President of the Board of Supervisors of the institution to warrant for the amount, even if the President was authorized to draw such a warrant.

Ib.

This court will not issue a mandamus to compel the judge of a lower court to grant an injunction, or a sequestration, in a case not before this court on appeal.

State ex rel. Padron vs. *Parish Judge of St. Bernard*, 794.

SEE STATE EX REL., ETC., VS. BOARD, ETC., 273.

SEE STATE EX REL. HERWIG VS. JUDGE, ETC., 800.

MARRIAGE CONTRACTS.

A written marriage contract, expressed in unambiguous terms, can not be varied by what was said before, at the time of, or after its completion. *Hanley* vs. *Drumm*, 106.

A marriage otherwise valid is not affected by the fact that no license was obtained. *Sabalot* vs. *Populus*, 854.

Where a couple have lived together as man and wife until the husband's death, the validity of the marriage can not be impugned on the ground that he was out of his mind when the marriage ceremony was performed. *Ib.*

MARRIED WOMEN.

When it appears from the evidence that property bought during marriage by the wife, and in her name, with the authority of her husband, who was a party to the deed of sale, was paid for out of

MARRIED WOMEN—Continued.

money that belonged to the wife, neither the executor of the husband, nor any devisee of the husband, who is not his creditor, or forced heir, can contest the widow's title to the property, and set up that it is community. *Drumm, etc.*, vs. *Kleinman*, 124.

Property bought by a wife, in her name, after the institution of her suit for a divorce and separation of property, which were subsequently decreed in her favor, is presumed to be her separate property. *Ib.*

The wife who is separated in property from her husband can not acquire property with his money to the prejudice of his creditors.

Spivey vs. *Wilson*, 653.

The title to real estate (which stands recorded as the property of the husband and a former partner of his), acquired by the wife, (who is separated in property) at a sheriff's sale, is null and void as to creditors of the husband and the partner, who seized it before the sheriff's deed to the wife was recorded.

Vickers vs. *Block, Britton & Co. et al.*, 672.

A sale of property by one who is not the owner, conveys no title whatever to the purchaser. *Ib.*

The authorization of a judge to a married woman to borrow money, and execute a mortgage to secure the payment thereof, does not bar the wife from proving by oral evidence that no money was actually borrowed by her, and that her mortgage was really given to secure an antecedent debt of the husband.

Hall & Lisle vs. *Wyche*, 734.

Where there is no proof to the contrary, the plantation of the wife is presumed to be cultivated and administered by the husband, for the benefit of the community; and where mules are bought by the community and put on the plantation, they do not become immovables by destination, or necessarily a debt of the wife. *Ib.*

Where a married woman, with the authority of her husband, and the sanction of the judge executes a mortgage on her property to secure the payment of money borrowed by her, it is, *prima facie*, valid, and no threats of her husband made out of the presence and hearing of the mortgage creditor, and to which he was not a party, can affect the validity of the mortgage.

O'Keefe vs. *Handy, Sheriff, et al.*, 832.

The defense by a married woman that although authorized by the judge to execute a mortgage on her property, he did not make the preliminary examination of her required by law, can not be maintained when it appears that after becoming a widow she has voluntarily ratified the mortgage debt by paying the interest on it. *Ib.*

MINORS AND TUTORS.

If it appears that the special mortgage given by the tutor in favor of the minor in order to release the general legal mortgage on the tutor's property was based on an homologated account of the tutor that was false and fraudulent on its face, the giving of the special mortgage, and the release of the general mortgage in the minor's favor, although sanctioned by advice of a family meeting and a decree of court, will be held null and void, not only as against the tutor's succession, but also as against any creditor of his cognizant of the fraudulent character of the homologated account.

Succession of R. J. Elliott, Lewis Austin, Tutor, vs. *Mrs M. E. Elliott, Administratrix, 31.*

Whenever an emergency arises which requires immediate action to protect the interests of a minor, it is the right and duty of the probate court to appoint a tutor *ad hoc* to act for the minor, until a tutor can be appointed.

In the Matter of the Minor, Victoria Fortier, 50.

An under tutor has no power to represent the minor in a rule taken by a third person to erase the general legal mortgage of the minor on certain property of the tutor, in a case where there is no opposition of interest between the minor and the tutor. A judgment, to erase, in such a rule, is an absolute nullity. *Ib.*

A confession of judgment made by a mother, in her capacity as tutrix of her minor child, is not binding on the minor or his property.

James A. Metcalfe vs. *Charles E. Alter, 389.*

A suit brought by a son who has attained his majority against his father on account of a claim he derives as heir of his deceased mother, is not a suit growing out of his father's tutorship, and hence can not be postponed by the latter until a final account of his tutorship has been rendered. *533.*

An agent employed by the tutor of a minor to manage a plantation of the minor, and employ laborers for its cultivation, is not authorized to form a planting partnership with one of such laborers.

Wm. S. McIntosh, Tutor, vs. *R. H. Kelly et al., 649.*

Where no valid contract has been made by the tutor for supplies furnished for the cultivation of the minor's plantation, the minor is liable for only so much of the supplies as are proved to have inured to his benefit. *Ib.*

The debt due by a former tutor, on account of sums collected by him after the emancipation by marriage of the minor, is not secured either by the tutorship mortgage, or by the mortgage created by article 3315 of the Civil Code, in a case where there is no necessary connection between the after gestion and the administration as tutor, and where the duration of the gestion, the sums paid the ward, and

MINORS AND TURORS—Continued.

all the facts, proved a knowledge, and consent on the part of the ward, thus creating an implied tacit mandate.

Succession of Romero, 721.

MORTGAGE.

The legislation of 1869 requiring all mortgages to be recorded in the same book did not require mortgages already legally registered to be re-recorded. *Succession of Elliott, 31.*

The vendor of land may acquire a legal mortgage on the land by virtue of recorded judgments against his vendee. *Ib.*

A recorder of mortgages can not deprive a mortgagee of his rights under a recorded mortgage by omitting it from the index, or by indexing it improperly, or by omitting it from his certificate.

Joseph Swan vs. *Geo. Vogel et al., 38.*

Where a widow makes two mortgages in favor of different parties, and is described in each as the widow of a person with the same given name, and whose family name is only spelled differently in the two mortgages by the transposition of two letters, the identity of the mortgagor is sufficiently indicated in each. *Ib.*

A mortgage on land in existence before the enactment of the homestead law is not affected by that law. *Cole* vs. *La Chambre, 41.*

It is not necessary to prove a mortgage, as to defendants against whom a formal judgment has been rendered expressly recognizing the mortgage. *Ib.*

The final decree of this court recognizing a mortgage which had been fraudulently canceled will not prevent the mortgage from perempting as to third persons, if it has not been re-inscribed within ten years after its record. *De St Romes* vs. *Blanc et al., 48.*

The rights and claims of concurrent mortgages, where a valid sale of the mortgage property has been made, is restricted to the *pro rata* distribution of the proceeds.

Factors' and Traders' Insurance Company vs. *De Blanc, 100.*

A third possessor evicted by a mortgage creditor can claim for his expenses and improvements only to the extent of the increased value of the property resulting from the improvements. If his expenses, incurred in making the improvements, are less in amount than the increased value arising from the improvements, he can recover only the sum of those expenses, and is liable for the fruits and revenues of the property from the moment he is notified of the order of seizure. *Linn* vs. *Dee et al., 217.*

If more than ten years have elapsed from the record of a mortgage it may yet be re-inscribed, and from the date of such re-inscription it will have effect as a mortgage. *Gordon* vs. *Knox, 284.*

The widow in community can not, while the succession is still under

MORTGAGE—Continued.

administration, and before its debts are paid, and her residuary interest thus definitely ascertained, execute a valid mortgage on her undivided half of any specific property of the succession. Where such a mortgage is sought to be executed by the mortgage creditor, the heirs are entitled to enjoin its execution.

Cestac vs. *Florane*, 493.

Heirs of age, who have been put in possession of the property of their ancestor by a judgment of court, can sell their hereditary property, but such sale will not disturb or affect the mortgages of their ancestor, nor those existing against the individual heirs.

Freret vs. *Heirs of Freret*, 506.

A mortgage is not negotiable, in the sense of the commercial law, although it be given to secure a negotiable instrument, and if it has been extinguished, or for any cause has ceased to be a subsisting obligation, so that it could not be enforced by the mortgagee, then it can not be enforced by any transferree of his, especially to the prejudice of a third possessor of the property on which the mortgage rests, who has paid the price of the property to the mortgagee, extinguished *pro tanto* the mortgage debt, and obtained from the mortgagee an order on the Recorder of Mortgages to cancel the mortgage. *Jennings* vs. *Vickers*, 679.

Where the transferree of a mortgage, which covers three different parcels of ground in the possession of three different persons, forecloses on two of the parcels, which sell for enough to pay his whole debt, and fails to enforce the sales, but by agreement with the possessors of the two parcels allows second sales to be made which do not realize the amount of his debt, he can not afterward proceed for the residue of his debt against the possessor of the third parcel of ground covered by the mortgage, who has bought the land in good faith, paid its purchase price, and to that extent, by special agreement with the mortgagee, extinguished the mortgage. *Ib.*

The crop growing on mortgaged premises is a part of the realty, and the owner of the premises, when they and the crop are seized under a writ of seizure and sale, has no standing to set up a privilege on the crop, alleged to exist in favor of a third person.

Williamson vs. *Richardson*, 685.

A mortgage on real estate executed by one only of the co-proprietors of the property can only affect the interest of the mortgagor in the property. *Johnson* vs. *Weinstock*, 698.

Neither the conventional partition of certain land held in indivision by two owners, nor the subsequent sale of that portion of the land acquired in the partition by one of the part owners (sold in his succession), can divest or impair any mortgagee of his undivided

MORTGAGE—Continued.

interest in the land executed by the other part owner, before the partition took place, when it does not appear that the mortgage creditor was a party to the partition.

Powell vs. *Hayes*, 789.

As against a special mortgage, the right of requiring a previous discussion of other property embraced by the mortgage, but subsequently sold, does not exist. *Ib.*

A creditor with a mortgage resting on the whole of a certain tract of land, who remits, or releases his mortgage on a portion of the land, thus enabling the debtor to sell that portion free from incumbrance, does not forfeit his right to proceed against, and subject to the payment of his whole debt, the remaining portion of the land, which had been sold to, and was held by a third possessor, because he had failed to subrogate such third possessor to his rights against the portion of land released from mortgage. The third possessor has no legal right to demand such subrogation. *Ib.*

The innocent holder of a mortgage note, executed by one in whom the recorded legal title of the mortgaged property rested, can not be affected by the fact the recorded title rested on a simulated sale.

Testart vs. *Belot et al.*, 795.

Peremption of a mortgage can not take place pending the possession of the mortgaged property by the mortgage creditor, who holds under a voidable tax-sale, and should such sale be annulled the mortgage will revive with the rank it held at the date of the sale.

New Orleans Insurance Association vs. *Labranche et al.*, 839.

The *bona fide* transferrees of concurrent mortgage notes are entitled to a ratable distribution of the proceeds of the mortgage property and the fact that one of the transferrees obtained his mortgage note after its maturity, does not impair his right to a ratable distribution

Reine vs. *Jack*, 859.

NEW ORLEANS (CITY OF).

The holders of the consolidated bonds of the city of New Orleans can not compel the city government to levy a tax on one species of property exclusively for their benefit.

State ex rel. Southern Bank vs. *Pilsbury, Mayor, et al.*, 1.

Section 37 of the act of 1852, imposing the special tax on real estate and slaves, did not form a part of the contract between the city of New Orleans and the holders of her consolidated bonds. *Ib.*

The city of New Orleans has no authority to impose wharfage and levee dues on vessels moored at a point within her corporate limits, at which she has constructed no work and expended no money for the use or convenience of vessels.

City of New Orleans vs. *Wilmot, Agent*, 65.

NULLITY OF JUDGMENT.

See Judgment.

OWNERSHIP.

Property purchased with the identical money stolen by the purchaser from a succession belongs to the succession, and may be sequestered in the hands and recovered from the possession of the purchaser by the curator of the succession. *Pirtle* vs. *Price*, 357.

Where an act of transfer expressly conveys the occupancy and possession "forever," not the mere usufruct, but the full ownership of the property is thereby passed.

In the Matter of the Mechanics' Society, 627.

PARISH OBLIGATIONS.

The owner of parish warrants who surrenders them to the parish in exchange for bonds of the parish which turned out to be void, acquires no right of action for damages against the parish because the warrants had been destroyed by the parish, to the knowledge and with the tacit consent of the owner. A suit on the destroyed warrants to recover their amount is the form of action proper in such a case. *O'Connor* vs. *Parish of East Baton Rouge*, 221.

The payment of parish warrants issued on account of commissions on suits prosecuted or defended for the parish by a district attorney *pro tem.*, when sued on by a third person, who holds them merely as pledgee of the district attorney *pro tem.*, may be resisted on the ground that the services for which the warrants issued were not rendered, or were inefficiently rendered. But the payment of the salary of a district attorney can not be resisted on the ground that he was inefficient or without learning. *Ib.*

The third holders and owners of negotiable bonds of a parish, which were issued by the police jury in exchange for warrants of the parish that were almost entirely illegal and void, and which thus had as their consideration a debt that was only partly due by the parish, have no better right to recover on the bonds than the original holders thereof, when all of the facts and circumstances under which they acquired the bonds, raises against them a legal presumption of negligence, notice, or *mala fides*.

Johnson vs. *Butler*, 770.

PARTITION.

Where a sale of property, in which minors are interested, is made under an order of court in order to effect a partition, it is not necessary that the full appraisement of the property should be bid.

Buddecke vs. *Buddecke*, 572.

In a suit for the partition of property of which minors, who are absentees, are co-proprietors, each of the minors is properly represented in the suit by a *curator ad hoc*. *Ib.*

PARTNERSHIP.

The surviving partner of a commercial firm who desires to liquidate the affairs of the firm, must demand the liquidation contradictorily with the legal representatives of his deceased partner, and any heir of the latter who may be present, or represented. His *ex parte* appointment and qualification as liquidator are wholly unauthorized. *Walmsley and Patterson* vs. *Mendelsohn & Newman*, 152.

The surviving partner of a commercial firm is not liable as liquidator, to account to the succession of his deceased partner for any single item of indebtedness to the succession, but to pay over the entire sum found to be due the succession, on the settlement of the partnership. *Ib.*

PAYMENT.

A payment on an account is imputable to the oldest items on the account. *Succession of Dinkgrave*, 703.

The creditor is bound to impute to the extinction of his credit all sums received by him from the debtor, or from the securities of the deb *Powell* vs. *Hayes*, 789.

See Mullin vs. Hart, 677.

PLEDGE.

See Privilege and Pledge.

POLICE JURY.

The lease of a building for a court-house made under the authority of an ordinance of the police jury of a parish is utterly invalid, unless means for paying the rent stipulated in the lease is provided for in the ordinance.

Trehan vs. *Police Jury, Parish of Jefferson*, 179.

An ordinance of a police jury forbidding the sale of liquors on Sunday has not for its object the enforcement of the observance of the Christian Sabbath, but is a mere police regulation, under the police power of the State for the preservation of public order; and hence is not obnoxious to any provision of the constitution of the State, or of the United States, respecting religion. Nor is such a regulation violative of the general law, or "law of the land."

State vs. *Bott*, 663.

The police jury of a parish have power to impose a uniform and equal license tax on all persons who pursue any particular business, or profession, and in the exercise of that right, may adopt by ordinance, the same tax on the various callings and pursuits, as that imposed by the Legislature. *Walters* vs. *Duke*, 668

The article of the constitution requiring that the title of every act shall express its objects, does not apply to the ordinances of a police jury. *Ib.*

PRACTICE AND PLEADING.

Any third person having an interest in the success of the relator or respondent in a mandamus suit, or an interest opposed to both, may intervene in the suit.

State ex rel. Southern Bank vs. *Pilsbury, Mayor, et al.*, 1.

A supplemental answer, not in conflict with the original answer, and which does not retard the trial, or require any other or different proof than that required by the original answer, is receivable.

Ib.

A continuance will not be allowed on account of the absence of evidence to be taken under a commission, when it appears that the party who applied for the commission was dilatory, and neglectful in taking it out. *Cole* vs. *La Chambre*, 41.

The absence of a witness will not warrant a continuance when it appears that the order to summon was given by plaintiff only two days before the trial, and that defendant offered to admit that the absent witness would, if present, testify as stated by plaintiff. *Ib.*

A depositary has a right to sue for and recover property fraudulently and surreptitiously taken from him.

Lannes et al. vs. *Courege et al.*, 74.

One having a joint interest may proceed alone to recover possession from a mere trespasser. *Ib.*

One who has the right to a separate action for the recovery of property, is not obliged to intervene in a suit between other parties involving the property. *Ib.*

A party can not divest the averments of his petition of their force as judicial admissions by discontinuing the suit in which the petition was filed. *Byrne* vs. *Hibernia National Bank*, 81.

The matters of defense that must be specially pleaded are those set up in avoidance, or extinguishment of an obligation admitted, or proved to have once existed. *Ib.*

A citation addressed to the wife and "her husband," is a sufficient citation to the husband. *Phipps* vs. *Snodgrass*, 88.

A plea to the jurisdiction of the court *ratione personæ*, must be made *in limine*. It is too late to file it after a judgment by default has been entered. *Ib.*

A judgment rendered by a court of competent jurisdiction against a defendant who was legally cited, and the sheriff's sale duly made in execution of that judgment, can only be attacked in a direct action to annul, brought in the court that rendered the judgment. Neither the judgment nor the sale can be assailed collaterally.

Factors' and Traders' Insurance Co. vs. *DeBlanc*, 100.

The last judicial day on which an application for a rehearing may be made does not expire at 6½ o'clock a. m. merely because this court

PRACTICE AND PLEADING—Continued.

adjourned *sine die* at that hour on that day. The application is in time if filed at any time during that day.

State ex rel. Fairchild vs. *Stillman*, 162.

A suit by an expelled member to compel restoration to a church membership on the ground that such restoration is necessary to enable him to enjoy the right of sepulture acquired by him as a member, is premature.

State ex rel. Soares vs. *Hebrew Congregation Dispersed of Judah*, 205.

Where a number of persons constitute a common agent for a common purpose no one of them has a right to compel the agent to render a separate account to himself. There should be but one proceeding, to which all persons in interest should be made parties, and their rights determined *in concursu*.

La. Board of Trustees American Printing House for the Blind vs. *Dupuy*, 305.

Where a case has been remanded for the sole purpose of ascertaining whether prescription was interrupted, the lower court may nevertheless entertain an inquiry into the fact (then for the first time put at issue) whether the plaintiff was dead before the institution of the suit; and if the fact is sustained by proper evidence the suit must be dismissed.

Nicholson & Co. vs. *Succession of Jennings*, 328.

On the trial of the peremptory exception that the plaintiff has not made proper parties to the suit, the allegations of his petition are taken to be true. *Kirwin* vs. *H. I. Co.*, 339.

On the trial of a rule to dissolve a sequestration the allegation of the sequestrator, in his affidavit, that the goods sequestered belonged to the succession of which he was curator, will be assumed as true, although it may be without foundation in fact.

Pirtle vs. *Price*, 357.

A purchaser in bad faith is not entitled to have the purchase price tendered to him before the institution of a suit for the recovery of the purchased property. *Germaine* vs. *Mallerich*, 371.

A written agreement between the undivided owners of certain real estate to make a partition of the same by dividing it in certain described lots does not become an actual partition and vest any separate part of the property in any one of them until the formation of the lots in accordance with the agreement.

Metcalfe vs. *Alter*, 389.

An intervention which has neither been answered nor proved, must be dismissed. *Washburn* vs. *Frank*, 427.

Where an owner of land, a part of which has been expropriated, ap-

PRACTICE AND PLEADING—Continued.

peals from the verdict of the jury and judgment of court fixing the terms of the expropriation, he must, if the judgment is affirmed, pay the costs of the appeal.

N. O. Pacific Railway Co. vs. *Gay*, 430.

There is no law requiring that three days should intervene between a verdict in a criminal case and the judgment pronounced thereon.

State vs. *Hamp Johnson*, 482.

The publication of the notice to delinquent taxpayers made by the Administrator of Finance of the city of New Orleans in virtue of Act 48 of the Legislature of 1871, stands in lieu of citation, and just as effectively brings the parties into court.

Elder vs. *City of New Orleans*, 500.

The right of a judge presiding in a court, and *de facto* discharging the duties of that office, can not be collaterally questioned by litigants therein. *Ib.*

The motion made by a judgment debtor to annul the judgment for want of jurisdiction because he resided in another parish, made actual citation unnecessary, and cured the defect if there had been no citation. *Bartlett* vs. *Wheeler*, 540.

It is not necessary that the judge should have authorized a wife to sue for a separation of property in a case where the husband in proper person accepted service of the wife's petition, and made no objection. *Spivey* vs. *Wilson*, 653.

An exception, which if maintained, will terminate the suit, ought to be tried and decided *in limine*. *Jennings* vs. *Vickers*, 679.

It is not necessary to pursue a defaulting tax collector and his sureties for money collected and not accounted for by him, in the form of an ordinary action. They may be proceeded against summarily, by rule, whether the collector was appointed before or after April 20, 1877. *Police Jury of Vermilion Parish* vs. *Brookshier*, 736.

Where the refusal of the judge to pass on an exception before going to trial, has not injured the defendant, as where the exception was overruled, the defendant can not complain. *Ib.*

The judge may conclude in open court a trial begun in chambers. *Ib.*

A judgment of a United States court, when made the basis of an action in a State court, may have its validity collaterally inquired into by those not parties to it. *Boisse and Husband* vs. *Dickson*, 741.

The tax collector is incapable of standing in judgment alone, in a suit by a taxpayer to enjoin the collection of a tax levied to pay a tax. The judgment creditor, for whose benefit the tax was laid, must be made a party to the suit. *Shields* vs. *Pipes*, 765.

The answer of a third person in possession of mortgage property

PRACTICE AND PLEADING—Continued.

bought by him, admitting possession, and referring specially to his title, will cure the defect in the pleadings of the mortgage creditor, who holds a mortgage on one fourth of the property, arising from the latter's fai'ure to describe or designate the portion of the property held by defendant. *Powell* vs. *Hayes*, 789.

Where a respondent makes answer to an application for a mandamus, he thereby waives his right of subsequently excepting to the proceeding on the ground that the allegations of the relator were not sworn to.

State ex rel. Mary L. and Annette Moore vs. *Parish Judge of St. Landry*, 802.

Persons in interest in a certain proceeding, notified of an application to compel a judge to grant an appeal in the case, can not rely on any exception to the regularity of the proceeding on the part of the relator, filed by the judge alone. *Ib.*

A sale however voidable will not be annulled at the suit of one who fails to show that he has been injured by the sale.

N. O. Ins. Ass. vs. *Labranche*, 839.

The holder of a first mortgage note has a right to proceed by motion, as third opponent in an executory proceeding instituted by the holder of another first mortgage note, secured by the same mortgage, to have the proceeds of the sale applied to the payment of his note.

Reine vs. *Jack*, 859.

Where an alleged sale is a mere simulation, it may be treated as a nullity, and the thing transferred by the pretended sale may be directly seized or attached by a creditor of the vendor. But where there is a real sale, however fraudulent, the creditor can not seize the property in the possession of the purchaser, but must resort to the revocatory action. *McAdam* vs. *Soria*, 862.

The failure to object to the admission of evidence bearing on an issue not made by the pleadings will not authorize the adjudication of that issue, when the evidence admitted is applicable to the issue made by the pleadings. *Ib.*

See Claflin & Co. vs. Lisso & Scheen, 171.

See Succession of Gollain, 173.

See Chapman vs. Nelson, 341.

See Farrar vs. Steele, 640.

See Williamson vs. Richardson, 685.

PREMATURITY OF SUIT.

See Practice and Pleading.

PRESCRIPTION AND INTERRUPTION OF SAME.

The one who pleads prescription must prove the facts necessary to sustain the plea. *Phipps* vs. *Snodgrass*, 88.

PRESCRIPTION AND INTERRUPTION OF SAME—Continued.

A formal petition by a mortgage creditor of a succession asking to be recognized as creditor, and demanding that the executor give security for his claim, is such a judicial demand as will interrupt prescription. *Berens* vs. *Executors of Boutte*, 112.

An executor who classifies a claim against the succession as one of its debts, and prays for the sale of succession property to pay the claim, thereby acknowledges the debt and interrupts its prescription. *Ib.*

The possession of shares in the stock of a corporation for three years, in good faith, and under a title translative of property; or their possession for ten years without good faith, or title, acquires the ownership of the shares by prescription.

Widow de St. Romes vs. *Levee Steam Cotton Press Company*, 224.

An action on an injunction bond to recover damages allowed on the dissolution of the injunction is only prescribed by ten years from the date of the bond. The prescription of the judgment which was enjoined can not affect the judgment in the injunction case wherein the bond was given. *Howell et al.* vs. *Cronan et al.*, 247.

The issuance of a *fi. fa.* under a judgment against one of the solidary debtors on a promissory note, will not interrupt prescription of the note as to the other solidary debtor, against whom no judgment has been obtained. *Britton & Moore* vs. *Miss Virginia Bush*, 264.

The rendition of a judgment against one of the makers of a solidary note, does not, as to the other maker who has not been sued, substitute the prescription applicable to judgments, for the prescription applicable to promissory notes. The maker who was not sued is liable only on the note, which is, as to him, prescribed in five years from the date of the judgment against his co-maker. *Ib.*

Partial payments inscribed on a promissory note, and signed by the deceased maker (whose signature is provable by parol testimony) are admissible in evidence to prove interruption of prescription.

Taylor vs. *McElvin et al.*, 284.

In a suit to revive a judgment *in solido* against several persons, service of citation on one of the debtors will interrupt prescription of the judgment as to all. *Hammett* vs. *Sprowl et al.*, 325.

As against the purchaser of mortgaged property sold by an assignee in bankruptcy, the hypothecary action of the mortgage creditor is prescribed by the lapse of ten years from the purchase of the property from the assignee.

Chapman vs. *Citizens' Bank of Louisiana*, 395.

A judgment will be prescribed by the lapse of ten years from its date unless revived. *Ib.*

The judicial mortgage arising in virtue of a judgment, and the hypothe-

PRESCRIPTION AND INTERRUPTION OF SAME—Continued.

cary action authorized by the mortgage both perish by the prescription of the judgment. Service of citation in the hypothecary action will not interrupt prescription of the judgment. *Ib.*

The action of a husband's creditor to annul a judgment of separation of property obtained by the wife, on the ground of its being in fraud of the husband's creditors, is only prescribed by one year from the date of the judgment of the creditor against the husband.

Darcy & Wheeler vs. *Labennes and Wife*, 404.

Prescription must be specially pleaded, or it will not be considered.

Fazende vs. *Morgan*, 549.

A claim for damages, founding in an offense, or quasi-offense, committed by a private individual, or by a public ministerial officer, is barred by the prescription of one year.

City of New Orleans vs. *Southern Bank*, 560.

A revocatory action to annul a mortgage made by an insolvent to secure a pre-existing debt, on the ground that the mortgage gave the creditor in whose favor it was made an unjust preference, is prescribed in one year from the date of the mortgage.

The People's Bank vs. *Girod, Wife, etc.*, 592.

The prescription which has for its object the acquisition of property, can only be invoked by one who has had possession as owner, not by one who has been in possession under a mere simulation of ownership. *Spivey* vs. *Wilson*, 653.

An action for the recovery of usurious interest is prescribed by one year from its payment. *Mullen & McGowen* vs. *Hart, Sheriff*, 677.

Where the acknowledgment of a succession debt by the administrator has no date, but it appears from the face of the record that it was made subsequent to an affidavit to the debt, which has a date, and that the debt would not be barred by prescription even if the acknowledgment had been made at the date of the affidavit, the plea of prescription will not prevail against it.

Succession of Dinkgrave, 703.

Where a payment on an account is made at a certain date, and judicial demand follows nearly two years thereafter, all the items on the account prescriptible in one year will be barred. *Ib.*

The homologation of an account of an administrator by the clerk of the court is not a judgment in the sense of article 1053 of the Code of Practice, and hence is not required to be revived. A debt embraced in such an homologated account is not therefore barred by the prescription of ten years. *Maraist* vs. *Guilbeau*, 713.

Placing a debt on his account by an administrator, and asking for authority to pay it, is an acknowledgment of its correctness, and prescription ceases thenceforth to run on it, while he is in office.

Ib.

PRESCRIPTION AND INTERRUPTION OF SAME—Continued.

All actions against tutors for debts due by them to the minors of whom they have had charge, and contracted during the period of the tutorship, are prescribed in four years from the majority of the minors. But debts of the tutor to the minor, arising after the termination of the tutorship, are not affected by the prescription of four years. *Succession of Romero, 721.*

A claim for damages by the owner of the land for the wrongful cutting of the drainage canal is prescribed by two years from the time the land was actually occupied and used for the construction of the works.

Jefferson and Lake Pontchartrain Railroad Company vs. *City of New Orleans, 478.*

An action for damages on account of an offense, or quasi-offense is prescribed by one year from the date of the act.

Gardiner vs. *Succession of Scherer, 527.*

PRINCIPAL AND AGENT.

See Agency.

PRIVILEGE AND PLEDGE.

The failure of the Recorder of Mortgages to register with the private contract formed by a furnisher of supplies with the planter the proof of its execution, will not impair the privilege acquired by the record of the contract. *Succession of Elliott, 31.*

Fees due physicians for professional services during the last illness can not be ranked as privilege claims unless duly recorded. *Ib.*

The privilege and pledge of the factor, or furnisher of supplies, on the growing sugar cane crop, under the act of 1874, only covers that portion of the crop which was, in the ordinary sense of the words, to become merchantable. It does not cover that reasonable portion of the crop which is necessarily reserved for seed cane, or the corn grown on the place, and necessary to the production of the subsequent crop. *Citizens' Bank* vs. *Wiltz, 244.*

As to the vendee, the vendor's lien is not lost for failure to record it within six days of the sale. *Gordon* vs. *Knox, 284.*

The lessor has a right of pledge on promissory notes that are the property of the lessee, and found on the leased premises.

City of New Orleans vs. *Metropolitan Loan Savings and Pledge Bank, 311.*

The principal has no privilege on the property of his deceased agent's succession on account of money of the principal collected by the agent and not paid over. *Ib.*

A debtor may validly convey his immovable property to his creditor, in the form of a sale, in order to secure the creditor, when the value of the property is not in excess of the debt due, reserving to himself

PRIVILEGE AND PLEDGE—Continued.

the right to redeem within a certain period. The continued possession of the property by the debtor in such a case, does not make the transaction a fraudulent simulation, or necessarily void. In such a transaction the conveyance, although in the form of a sale, does not vest the ownership of the property in the creditor, but may give him a right to be paid by priority out of its proceeds.

Parmer vs. *Mangham*, 348.

A simulated sale of property subject to the lessor's lien can not defeat that lien. *Washburn* vs. *Frank*, 427.

Where the planter or farmer pledges his growing crop to his factor under the act of 1874, and the contract of pledge is duly recorded the factor will have a right of pledge and privilege on the crop superior to the lien acquired by seizure under a *fi. fa.* of an ordinary judgment creditor. The factor's pledge covers not only the money and goods advanced by him, and proved to have been actually used in making the crop, but also all advances of money and necessary supplies that *may be required* by the planter, unless it be shown that the factor knowingly advanced money or supplies for other purposes than making the crop. *Laloire* vs. *Wiltz*, 436.

Payment by the factor of the wages due the laborers on the plantation, and obtaining a subrogation to their rights, does not exclude the factor from claiming the sum thus paid as an advance embraced by the recorded contract of pledge between him and the planter.

Ib.

Money advanced by a factor to pay for the necessary mechanical labor to put the sugar-house and machinery in the condition to produce sugar is covered by the factor's lien under the statute of 1874.

Ib.

The funeral expenses of a debtor, or his wife and children, operate as a privilege on the real estate of the community, when there is no other source from which those expenses can be paid, and this privilege ranks any mortgage on such real estate.

Alter vs. *O'Brien*, 452.

When a mortgage creditor proceeds in a court of ordinary jurisdiction to enforce his mortgage on property owned by the community which had existed between the debtor and his deceased wife, a creditor with a privilege on the mortgaged property on account of the funeral expenses of the deceased wife is entitled to come in and claim his lien on the proceeds of the property, and a representative of the succession of the wife is not a necessary party to the proceeding. *Ib.*

The State taxes, and taxes due the city of New Orleans on real estate within the city limits, operate as concurrent privileges on the property, and hence no adjudication of the property under a sale for the

PRIVILEGE AND PLEDGE—Continued.

compulsory payment of State taxes will extinguish the liens of the city for its taxes, when the price of the adjudication is not sufficient, on a proportional distribution between the city and State, to pay to the State the full amount of its taxes.

Bellocq vs. *City of New Orleans*, 471.

A furnisher of materials who constructs a building on a lot owned by two co-proprietors, under a contract made with one of the co-proprietors, which is subsequently recorded, is entitled to a privilege on the entire building for the costs of material and price of workmanship.

Johnson vs. *Weinstock*, 698.

The privilege of the builder and furnisher of materials ranks any mortgage in existence at the time the builder's contract is made, even though he neglects to record his privilege until after the building has been constructed. *Ib.*

A builder who is entitled to privilege on an entire building, in virtue of a contract made with one only of the owners of the building, has a right to a decree recognizing that privilege, in a suit brought against only that one of the owners with whom he had contracted. *Ib.*

The vendor has, for the security of the unpaid portion of the purchase price, a privilege on the thing sold. That privilege exists by mere operation of law, and need not be reserved by any stipulation in the act of sale. *Dejean* vs. *Hebert*, 729.

Where an act of pledge which states the amount of the debt, and the nature of the thing given in pledge, omits to state the thing was delivered to the pledgee the testimony of the pledgee that he did receive the thing at the time the act of pledge was executed, given in response to a question put by a creditor of the pledgor who is attacking the validity of the pledge, is admissible to prove delivery. It is not conceded that an act of pledge need state that the thing pledged was delivered. *Auge* vs. *Variol*, 865.

The fact that a thing is held in pledge by one creditor, who is empowered to sell the thing at public or private sale, does not prevent other creditors of the pledgor from seizing the thing in the hands of the pledgee and having it sold, subject to the pledgee's claim *Ib.*

Movables of a lessee which are subject to the lessor's lien may be seized and sold under the execution of a judgment creditor of the lessee, subject to the lessor's lien on the proceeds of the sale. A right of pledge does not enable the pledgee to retain, as against creditors who seek by sale to compel the realization and distribution of the proceeds of the thing pledged. 2 N. S. 22; 1 N. S. 417; 13 La. 341; 31 A. 865. *Pickens* vs. *Webster, Sheriff, and Schmidt & Zeigler*, 870.

See Succession of Linton, 130.

See Augé vs. Variol, 865.

See Pickens vs. Webster, 870.

PROHIBITION—WRIT OF.

Where an injunction, restraining the execution of an order of seizure and sale on the ground that the sale was not exigible, is dissolved, and the plaintiff in injunction takes a suspensive appeal from the judgment of dissolution, the lower court will be prohibited from ordering the execution of the seizure and sale (because of the subsequent maturing of the debt) until this court has passed on the question of the prematurity of the suit involved in the appeal.

State ex rel. Widow Merz et al. vs. *Judge of the Third District Court, 120.*

The Supreme Court is without jurisdiction to issue a writ of prohibition to a district judge, to whom a petition has been addressed, praying that testimony be taken in the case of a contested election of a member of the Legislature, forbidding him to grant an order for the production of ballot boxes and counting the ballots. In such cases the lower judge acts, not in a judicial capacity, but merely as a commissioner.

The State ex rel. M. H. Redon vs. *J. H. Spearing et al., 122.*

PROMISSORY NOTES.

See Bills and Notes.

PROVISIONAL SEIZURE.

A lessor may obtain the writ of provisional seizure, on making the proper affidavit for rents not yet due and exigible.

Virginia Thomas vs. *J. J. Dundas, 184.*

On trial of the motion to set aside a writ of provisional seizure, evidence is admissible to show that the affidavit on which the writ issued is false. And when such evidence is introduced the plaintiff must support his affidavit by proof. *Ib.*

The facts giving rise to that "reasonable apprehension" in a lessor that justifies him in issuing a writ of provisional seizure, need not be convincing enough to support a conviction on a criminal charge. It is sufficient that they are of such a character as to rebut the presumption of malice, or wantonness in suing out the writ. *Ib.*

PUBLIC ADMINISTRATOR.

The Public Administrator is not entitled to the administration of a succession when the attorney in fact of an heir, especially if the heir be present, applies for the administratorship, and tenders the requisite security. In such a case the lower judge exercises the discretion vested in him soundly, by appointing the agent of the heir.

Succession of Walter Henry, 555.

REDEMPTION FROM TAX SALES.

See Taxation.

REMOVAL OF CASES.

Under the act of Congress passed in 1875 a suit can not be removed from a State to a Federal Court, after the case has been twice fixed for trial in the State court at two different sessions of said court.

Cole vs. *La Chambre*, 41.

Where an hypothecary action has been instituted against a third possessor of the mortgaged property, a non-resident warrantor, who has been called in warranty by the third possessor, is not entitled to have the cause removed to the Circuit Court of the United States, under the act of Congress of March 2, 1875.

Hebert vs. *Lefevre*, 363.

When it appears that a case arises under the constitution, or a law of the United States, it can be removed to the United States Circuit Court when the application to remove is made at the term of the State court at which it could first have been tried, and before the trial thereof. *Ib.*

The "term of the State court," referred to in the act of Congress providing for the removal of cases, means the first term the case would be triable under the laws and rules of practice of the State, and not the term at which, under a press of business, it may actually come up for trial. *Ib.*

RES ADJUDICATA.

The judgment rendered in a previous suit between the same parties has not the force of *res adjudicata* when the matter at issue in the previous suit was different.

State ex rel. Southern Bank vs. *Pilsbury*, 1.

A judgment against defendants not legally capable of standing in judgment is a nullity, and can not be pleaded as *res adjudicata*.

Labauve vs. *Slack*, 134.

A judgment recognizing certain parties as the legal heirs of their deceased grandmother, rendered in a suit against the surviving husband of their grandmother, who claimed under her will to be her universal legatee, may be pleaded as *res adjudicata* against him in a suit to annul the judgment brought by him in the assumed capacity of a legal heir. *Succession of Lebrew*, 212.

The binding effect of *res adjudicata* can not be impaired by the fact that the thing established by it involves a question of public order, and is afterward found to be wholly untrue. The presumption that the thing adjudged is true is so conclusive, no subsequent discovery can disturb it. *Ib.*

Where in a particular case this court has decided that the Superior District Court of the parish had jurisdiction, the parties to that case can not re-open the question of jurisdiction.

Kirwin vs. *H. I. Co.*, 339.

RES ADJUDICATA—Continued.

Where an emancipated minor, who has sold her undivided interest in an immovable, recognizing in the act of transfer a mortgage on the property in favor of a certain mortgagee, sues to annul her emancipation (making the mortgagee a party to the suit) in order to invalidate the mortgage, and afterward, and before a final decree in the suit to annul contests by way of third opposition the mortgagee's right to foreclose, on the ground that the mortgage was invalid because of her minority, a final decree in the suit to annul the judgment of emancipation maintaining the judgment, will be conclusive of the contest in the third opposition, in the mortgagee's favor.

Dupré and Husband vs. *Soye*, 450.

A final judgment rendered by this court is not amenable to an action of nullity, instituted more than one year after the date of the judgment, on the ground of error of fact and of law. Such a judgment has the force of *res adjudicata* as to the parties to it.

Grivot vs. *La. State Bank*, 467.

The judgment of the court, rendered without opposition on a motion to annul a judgment for want of jurisdiction, is *res adjudicata* on the question of jurisdiction. *Bartlett* vs. *Wheeler*, 540.

Where a person is sued as a resident of a parish where the suit is brought, and is personally cited, a judgment regularly confirmed on default against him will be *res adjudicata* against a plea that he resided elsewhere. *Goodrich* vs. *Hunton*, 582.

The valid judgment of a court, rendered in a monition proceeding, homologating a tax sale of property, has the force of *res adjudicata* and operates as a complete bar against minors, and all other parties in interest, on account of any illegality or informality in the proceedings whether before or after the judgment, and shall be conclusive proof that the sale was made according to law.

Sewell vs. *Watson*, 589.

A decree dissolving an injunction, on the ground that it was not accompanied by the bond required by law, can not be pleaded as *res adjudicata* in a second injunction issued with bond by the same plaintiff, for the same causes of action.

Williamson vs. *Richardson*, 685.

REVIVAL OF JUDGMENT.

In a suit to revive a judgment the defendant can not set up any grounds of defense which would not, if true, have rendered the judgment absolutely null and void.

George Hammett vs. *Wm. Sprowl, et al.*, 325.

Where an exception filed by the defendant was treated by the court, the plaintiff and himself as an answer, and on that assumption the case was tried, and judgment rendered, he can not afterward, in a suit

REVIVAL OF JUDGMENT—Continued.

to revive the judgment, complain that no default against him was entered. *Ib.*

One who has a judgment against several persons jointly, or *in solido*, has a right to sue for the revival of the judgment against one only of his judgment debtors. *Ib.*

In a suit to revive a judgment there are but two necessary and proper parties, viz., the judgment creditor or his legal representative and the judgment debtor or his legal representative. Third persons who hold property affected by the legal mortgage resulting from the inscription of the judgment sought to be revived, are not necessary or proper parties to the suit to revive.

Mrs. Esther Chapman, Executrix, vs. *S. O. Nelson et al.*, *341.*

In a suit to revive a judgment against a debtor who has made a surrender in bankruptcy, under the bankrupt law of the United States, the assignee of the bankrupt is not a necessary party, and can not, therefore, be compelled to appear as a defendant in the suit. *Ib.*

A suit to revive a final judgment which was rendered by the Third District Court, for the parish of Orleans, in March, 1867, can not be brought in the Fourth District Court of that parish. The transfer of the suit in which the original judgment was rendered, first to the Seventh and afterward to the Fourth District Court, of said parish, under the acts of the Legislature in 1868 and 1872, did not give to either of those courts jurisdiction of the suit to revive. *Ib.*

REVOCATORY ACTION.

SEE ACTION.

SEE, ALSO, MCADAM VS. SORIA, 862.

RIGHT OF ACTION.

SEE ACTION.

RIGHT OF WAY.

The grant of a right of way to a railway company, made by an owner of land by public act, in which act he sets forth the probable increased value of his land, on account of the building of the railroad, as one of the causes of the grant, is not a gratuitous donation. It is a transfer based on a valid consideration, and can not be revoked by any *ex parte* act on the part of the grantor for any of the causes which warrant the revocation of a gratuitous donation.

Paul Jules Fazende vs. *Chas. Morgan*, *549.*

The grant of a right of way for as many tracks as the business of the grantee, a railroad company, may require, is not necessarily exhausted by the laying of one track. Such a grant includes the right to lay as many tracks as the *evidence* shall show that the business of the company requires. *Ib.*

RIGHT OF WAY—Continued.

The acceptance of a grant of the right of way by the grantee need not be evidenced by an authentic act. Actually using the right in part for a number of years is admissible in proof, and is conclusive evidence, of its acceptance, as to the entire extent of the grant.

Ib.

RULES.

See Practice and Pleading.

SALE.

Where a surviving wife sells a parcel of community property owned in indivision by herself and her minor children, and the sale is subsequently ratified by the children after they attain majority, or while they are minors, by a decree of court on the advice of a family meeting, such ratification, even though made after the institution of a suit by the vendee of the property to annul the sale, will cure any defect in the sale arising out of the wife's want of power to sell when that defect is set forth in the act of conveyance to the vendee, and he consents in the act, that the defect of title may be subsequently cured and the sale thereupon perfected.

Charpaux and Valette vs. *Bellocq*, *164.*

The failure of a vendor to perform a condition of the sale is a passive breach of contract, and before an action to annul because of such breach can be maintained, the vendor must be put in default. An offer to annul made by the vendee does not amount to a default.

Ib.

A purchaser in bad faith is liable for the fruits and revenues of the property while in his possession. *Germaine* vs. *Mallerich*, *371.*

SALES—(JUDICIAL, AND SUCCESSION.)

Innocent third persons who purchase property at a public sale held under the decree of a court of competent jurisdiction, cannot be affected by any irregularities in the decree subsequently ascertained.

Wisdom vs. *Buckner*, *52.*

The failure of an administrator to obtain an order of court for the sale of succession property contradictorily with an attorney of absent heirs, will not render the sale null and void. The purchaser at such a sale is not affected by such irregularities.

Heirs of Herriman vs. *Janney*, *276.*

In the absence of a newspaper published at the place where the probate court is sitting, *Posting* an application for letters of administration is sufficient. *Ib.*

Where an order of sale of succession property is applied for it is sufficient to cite the administrator. It is not necessary to obtain the order contradictorily with an attorney of absent heirs. *Ib.*

SALES—(JUDICIAL, AND SUCCESSION)—Continued.

The question as to what was sold at a public sale by the sheriff is determined by the adjudication, not by the sheriff's deed. *Ib.*

The sale of a deceased husband's property under executory process will be held invalid when it appears that the appraiser, by whose appraisement the property was sold, was appointed by the widow, and that she was not the agent of her deceased husband, or the legal representative of his succession.

Germaine vs. *Mallerich*, 371.

The mere fact that a widow appoints an appraiser, in the sale of community property sold under executory process, will not make the sale a valid one as to her half of the property, when it appears that she acted for her husband, of whose death she was ignorant. *Ib.*

Property of a succession sold for cash in order to pay the debts of the succession must, at its first offering, bring its full appraised value. If thus sold for less than its appraised value, the sale will be invalid.

Succession of Tabary, 409.

SCHOOL BOARDS.

Under the authority of the Board of School Directors of a parish, the treasurer of the board may make a valid sale of the warrants of the State which represent that portion of the interest on the free school fund due to said parish.

Board of School Directors of Concordia Parish vs. *Hernandez*, 158.

SEIZURE AND SALE.

An injunction without bond and security will not issue to restrain an order of seizure and sale except on the sworn allegation of one or more of the specific causes enumerated in article 739 of the Code of Practice. If any other cause is alleged by the plaintiff in injunction, in addition to any of those enumerated in article 739, he must give bond and security.

Anais Berens vs. *Executors of Francois Boutte*, 112.

The opposition of a mortgage creditor to the account of an executor on the ground that he was not recognized as a mortgage creditor on the account, is not such a proceeding *via ordinaria* as will prevent the creditor from afterwards proceeding *via executiva* against the property subject to his mortgage. *Ib.*

The mere fact that a mortgage note is prescribed on the face of it will not prevent the issuance of a writ of seizure and sale to enforce its payment. *Ib.*

The special mortgage executed by a tutor in favor of minors, in order to relieve his property from the general legal mortgage in their favor does not import a confession of judgment for any specific amount and hence does not authorize executory proceedings.

Edward Linn vs. *Edward Dee et al.*, 217.

SEIZURE AND SALE—Continued.

The service of the notice of seizure and sale by a deputy sheriff who is a minor can not be availed of by the defendant in an executory proceeding as a ground for enjoining the proceeding. That would be to allow, in effect, the validity of the appointment of a ministerial officer to be attacked collaterally, which is not permissible.

Williamson vs. *Richardson, Sheriff, et al.*, 685.

A writ of seizure and sale, although issued nominally only against the mortgaged premises, includes, without any particular specification of them, all things on those premises which are immovable, either by nature, or by destination. *Ib.*

It is not necessary for the sheriff to advertise and sell mortgaged property, seized under executory proceeding, in lots or tracts of not less than ten, nor more than fifty acres. Such property is properly advertised and sold in block. *Ib.*

An act of mortgage in which the debtor acknowledges the debt secured by the mortgage, imports a confession of judgment, and under such an act executory proceedings may be instituted.

Dejean vs. *Hebert et al.*, 729.

SEPARATION OF PROPERTY.

It is not necessary to record a judgment of separation of property obtained by a wife against her husband. If otherwise in accordance with law it is valid without being recorded.

W. T. Hardie vs. *Turner, Wilson & Co.*, 469.

Where no decree for money is involved in the judgment of separation of property obtained by a wife, the issuance of a *fi. fa.* under such a judgment is not practicable, and therefore not necessary to perfect the judgment. And when there is no property of the husband transferred to her for the payment of her judgment, no notarial act is necessary or proper, in order to complete the judgment. *Ib.*

A valid judgment of separation of property in favor of a wife is retroactive, and takes effect from the day the wife filed her demand for a separation.

Mrs. L. Virginia Vickers vs. *Block, Britton & Co.*, 672.

A judgment of separation of property, which has been duly advertised, may be partly valid, and partly invalid; valid as to that part which decrees a dissolution of the community, and authorizes the wife to resume the administration of her paraphernal effects, and invalid as to that part which decrees an indebtedness of the husband to her. *Ib.*

In order to maintain a suit for separation of property, it is not essential that the husband should be indebted to the wife, or that she should own any property in her own right. A judgment of separation need only decree a dissolution of the community, and the wife's resump-

SEPARATION OF PROPERTY—Continued.

tion of the administration of her own effects, and the issuance of an execution is not necessary to the perfection of such a judgment. *Ib.*

SEQUESTRATION.

An affidavit which verifies the necessary allegations in the petition for writs of sequestration and injunction, is sufficient to maintain the writs. *Lannes et al.* vs. *Courege et al.*, 74.

Allegations showing right of possession in the plaintiff and wrongful possession of defendant, and the fear of plaintiff that defendant will part from the property, are sufficient facts to warrant a sequestration. *Ib.*

The fact that defendant has sued on certain promissory notes, and filed them in court as evidence of the claim sued on, will not prevent the plaintiff, who has a right to their possession, from sequestering them. *Ib.*

SHERIFF AND HIS SURETIES.

The sheriff is not authorized to receive from the purchaser of property at a judicial sale the amount of the mortgage or privileged debts which rank the claim of the seizing creditor, and hence the sureties of the sheriff can not be held for the amount of such debts received and not accounted for by the sheriff. *Bacas* vs. *Hernandez*, 85.

When the sheriff and his sureties are sued for money collected by him under a writ issuing from a certain court, they can not, under the plea of a general denial, raise the defense that the court was without jurisdiction to issue the writ. *City of New Orleans* vs. *Waggaman*, 299.

The sheriff is authorized to receive money in satisfaction of a money demand to enforce the payment of which a provisional seizure has issued, and hence his sureties are bound for such money. *Ib.*

The sheriff commits a breach of his bond when, on the demand of its owner, he fails to pay over the money collected by him. *Ib.*

The agreement of parties to leave a fund in the hands of the sheriff, of which he is the legal custodian, does not release him from responsibility for that fund. *Ib.*

The sureties of a sheriff are entitled to have the property of their principal discussed before execution issues against them, but are not entitled to the right of division. *Ib.*

SIMULATION.

Where property subject to a certain mortgage is passed by a simulated transfer to a nominal buyer, who formally recognizes the mortgage in the transfer, the widow and administratrix of the owner, who joined her husband in the simulated transfer, can not afterward have the property sold as a part of her husband's succession to the

SIMULATION—Continued.

prejudice of the mortgage creditor. Such an adjudication is absolutely null and may be attacked collaterally.

Succession of Tabary, 409.

Where the seller remains in possession of the thing sold, the sale is presumed to be simulated, and in the absence of proof to the contrary, will be held to be simulated. *Spivey* vs. *Wilson, 653.*

A simulated sale of property is absolutely null and void, and any judgment creditor of the owner may seize and sell the property in the hands of the pretended purchaser.

Vickers vs. *Block, Britton & Co., 672.*

See McAdam vs. Soria, 862.

SUBROGATION.

A second mortgage creditor who buys first mortgage notes is thereby legally subrogated. *Reine* vs. *Jack, 859.*

SUCCESSION.

The debts of the succession of a deceased person must be paid in preference to the debts of the deceased.

Succession of Linton, 130.

The costs of holding a family meeting to appoint a tutor are not chargeable to the succession, if the minors have means of their own, but to the minors. *Succession of Gollain, 173.*

The executor can not be compelled, under the garnishment process of a judgment creditor of an heir, to surrender the undivided portion of the heir in a succession whose debts and legacies are unpaid.

Deblieux & Co. vs. *Hotard, 194.*

A presumptive heir, who is not shown to have accepted the succession of his deceased mother either unconditionally, or as beneficiary heir, and who has subsequently renounced the succession, is not liable for the debts of the deceased, and may in the absence of proof of an intent on his part to defraud creditors make a valid purchase of the property of the succession sold at a tax-sale.

Miltenberger vs. *Weems Heirs, 259.*

The succession of a deceased person is bound for the rent due for the unexpired term of a lease made by the deceased.

Succession of Stone, 311.

One who opposes every item of an administrator's account can not be said to ratify a certain adjudication of property the proceeds of which are sought to be distributed by the account.

Succession of Tabary, 409.

No heir of a father, whether major or minor, can dispute the binding effect of a *bona fide* mortgage on community property executed by the father during the life of the mother.

Dupre and Husband vs. *Soye et al., 450.*

SUCCESSION—Continued.

A succession is terminated when, all the debts appearing to have been paid by a final account of its administrator duly homologated, the heirs shall have been put in possession of the hereditary effects by a judgment of court. *Freret* vs. *Heirs of Freret*, 506.

Or when, the debts not being all paid, and the account of the administrator's actual gestion being duly homologated, the heirs *nemine obstante* are put in possession by a judgment of court, in which case each heir is liable to the creditors for his virile share. *Ib.*

Where plaintiff institutes a hypothecary action to enforce a judgment, which as heir, and as administrator of his deceased mother, he had obtained against his father, the fact that he fails, when properly put to the proof, to show that he was the administrator of his mother, will not prevent him from enforcing his rights as heir of his mother. *Cambre* vs. *Grabert et al.*, 533.

Where a surviving father joins in the petition of the universal legatee of his deceased daughter, praying that the universal legatee be recognized as the owner of all her estate, and be put in possession of the same, he thereby effectively renounces his right of action to have his daughter's legacy reduced to the disposable portion of her estate. Such action on the father's part amounts to a ratification of the donation made by his daughter to his prejudice, and he is thereafter estopped from contesting the validity of the donation. *Nolan* vs. *Succession of New*, 552.

Where a debt against a succession, duly sworn to, is offered in evidence without objection by the administrator, it will be held to be *prima facie* proven. *Succession of Dinkgrave*, 703.

Where the debt of the deceased as a surety has been placed by his administrator on the latter's tableau, the succession will be liable for the debt, unless some fact is affirmatively shown that would discharge or release it. *Ib.*

Any creditor of a succession, whose claim has not been prescribed, may demand an account from the administrator. *Maraist* vs. *Guilbeau*, 713.

The interest of an heir in a succession is his share of the residuum after the payment of the debts of the succession. *Boisse and Husband* vs. *Dickson et al.*, 741.

See Heirs, etc., vs. Janney, 276.

SURETY.

The judgment of a court against the liquidator of a partnership for the rent of a store-house used by him is not conclusive as to the surety on the former's bond as liquidator, who was not a party to the judgment. *Walmsley and Patterson* vs. *Mendelsohn & Newman*, 152.

SURETY—Continued.

Where the plaintiff who sues the sureties on an official bond alleges the hopeless insolvency of the principal, the sureties will not deprive themselves of the right of discussion, to which they are entitled under the law, by pleading an exception that admits the truth of the averment of insolvency.

State ex rel. School Board, Parish of St. Tammany, vs. *Cousin*. 297.

Where the sureties on a bond bind themselves severally for a certain amount, each is liable up to that amount for any debt he may be bound for as surety. *City of New Orleans* vs. *Waggaman*, 299.

The insertion of a clause in a bond for the release of sequestered property to the effect "that the sureties shall satisfy such judgment as may be rendered in the pending case," is not authorized by law, and therefore is not binding on the sureties.

Mulligan vs. *Vallee*, 375.

Where the sequestered property of a defendant has been released on bond, and it appears that whatever part of such property afterward sold, or destroyed by use was replaced by the defendant or by other property of greater value which was subsequently subjected by the sequestering creditor to the satisfaction of his judgment, the sureties on the defendant's release bond can not be held liable for any balance of the plaintiff's judgment that may remain unsatisfied.

Ib.

Where an *employee*, who has been engaged to perform the duties of a certain office, which he holds at the pleasure of his employer, and who has given bond and surety for the faithful discharge of the work and duties of said office, is transferred by the employer to another parish, and there put by the employer to doing entirely different work, at a different salary, for two months, and during that time, with the consent and aid of the employer, obtains and holds the place of mail agent of the United States, the term of his original office thereby ends, and his surety is liable for no loss caused by his subsequent misconduct, in said office, to which he is a second time called by his employer. *Green* vs. *Locke*, 656.

Where a surety who is called on to pay the debt of the principal compromises and settles the debt for a sum much less than the amount of the debt, (as for example where he pays the debt in depreciated warrants) he is entitled to claim from the principal only the actual sum paid by him. And it will be assumed that he paid only what was shown to be the market value of the warrants used in settling the debt, unless he proves the contrary.

Succession of Dinkgrave, 703.

SURETY—Continued.

Where the delay in proceeding against a defaulting tax collector has not prejudiced his sureties' right of subrogation, they can not complain of the delay. *Police Jury* vs. *Brookshier*, 736.

Where each of the sureties of a tax collector has obligated himself for a specific sum, each can be held only for that sum, and all of them can be held for no more than the full amount due by the collector to the State. *Ib.*

TAXATION, AND EXEMPTION FROM.

The fact that the rents and revenues of property owned by a charitable corporation are devoted to the charitable purposes for which the corporation was organized, will not exempt such property from taxation. It is only when the property itself is actually and directly used for charitable purposes that the law exempts it from taxation. *City of New Orleans* vs. *St. Anna's Asylum*, 292.

A license to conduct a banking business does not authorize the carrying on of a pawnbroking business. *City of New Orleans* vs. *Metropolitan Loan Savings and Pledge Bank*, 310.

The sixth section of the act 31 of 1876 known as the "premium bond" act limiting the taxing power of the city of New Orleans refers to taxes on property, and not to those imposed by way of licenses on occupations, etc. *Ib.*

A mortgage creditor may redeem from a tax sale the property on which his mortgage rests, either in his own name, or in the name of his debtor, the former owner, and when the purchaser at the tax sale refuses to accept the sum necessary to redeem when tendered in the name of the former owner by the mortgage creditor, the latter may seize and sell the property to satisfy his debt. *Montgomery & Deloney* vs. *Burton*, 330.

The owner of a restaurant and liquor saloon on board of a vessel plying on navigable waters between this and an adjoining State, and touching at intermediate places in the course of her voyage, can not be compelled by the local authorities of any of those places to pay a license tax for selling spirits, when it appears that he sold liquors only on board the vessel. *State* vs. *Frappart*, 340.

The duty imposed by section 145 of the Revised Statutes of 1870 on goods sold at public outcry by licensed auctioneers, and which duty is to be paid by the vendors of the goods, is not a tax on property, and hence does not fall within the prohibition of the constitutional amendment of 1874 limiting taxation to 12½ mills. Nor is such a duty in violation of article 118 of the constitution requiring taxation to be equal and uniform, etc. *Wintz* vs. *Girardey*, 381.

TAXATION, AND EXEMPTION FROM—Continued.

The constitutional provision granting to the Legislature the power to exempt from taxation property actually used for church, school, or charitable purposes is an enumeration, and excludes from exemption all property not enumerated.

Louisiana Cotton Manufacturing Co. vs. *City of New Orleans*, 440.

Where property has been sold in a legal and *bona fide* way to pay the taxes due on it to the State, and the State becomes the purchaser, and subsequently after the time for its redemption has passed makes a valid sale of it to a third person, all mortgages on it previous to the tax sale in favor of individuals are extinguished, and no previous mortgage creditor can disturb the title or possession of any subsequent purchaser on the ground of fraud or simulation as between him and any previous purchaser.

Maumus vs. *Beynet*, 462.

The vendee of the purchaser of property at a tax sale has the same right to receive a title to the property from the Auditor, after the time for redeeming the property has elapsed, as the purchaser has. *Ib.*

A sale of property to pay State taxes will not cancel or release either State or city taxes of a subsequent year.

Bellocq vs. *City of New Orleans*, 471.

The registry of the taxes due the city of New Orleans is a seizure of the property on which the taxes are assessed, and operates as a binding notice to all future sellers and buyers of the property; and such property can only be sold by the State, under a seizure subsequent to the registry of the city taxes, subject to the city's lien. *Ib.*

Tax liens, or privileges on certain property, which were not recorded at the time a third person acquired rights to, or upon the property, can not be enforced to his prejudice, when it appears that such liens arose from a tax imposed *before* such third person acquired his interest. *Jacob* vs. *Preston*, 514.

A banking corporation which organized in the year 1873 under the free banking law reënacted in 1870, is liable for the same license tax imposed on other banking institutions.

The State of Louisiana vs. *the Southern Bank*, 519.

A cigar manufacturer in the city of New Orleans, although engaged in selling articles of his own manufacture, is liable for the license tax imposed by the city. *City of New Orleans* vs. *Hermann*, 529.

All transient persons selling goods in this State whether by wholesale or retail, on land or water, are liable to a license tax of $100 per annum.

Cole vs. *Randolph*, 535.

TAXATION, AND EXEMPTION FROM—Continued.

The law imposing a license tax on transient persons doing business within the State, does not violate that provision of the constitution of the United States vesting in Congress the exclusive power to regulate commerce among the several States, etc. *Ib.*

Act No. 70 of the extra session of the Legislature of 1870, which incorporates the Louisiana Savings Bank and Safe Deposit Company, and which exempts the company from taxation except on real estate, does not exempt it from the payment of the *license* tax imposed by the city of New Orleans on all persons engaged in a similar business.
City of New Orleans vs. *Louisiana Savings Bank and Safe Deposit Company, 637.*

Where the Legislature has imposed a license tax upon those who pursue a certain calling, or business, it cannot in the absence of any valuable consideration, exempt any particular person, or persons pursuing that calling, or business, from the payment of the license. Such an exemption is unconstitutional. *Ib.*

There is no law governing the amount of license tax the city of New Orleans may impose on persons pursuing any particular business, It is a question of expediency, of which the city authorities are the sole judges. *Goldsmith* vs. *City of New Orleans, 646.*

The license of $2500 a year imposed by the city of New Orleans on persons who carry on the business of a coffee-house, or drinking saloon, with theatrical performances attached, is not unconstitutional, and the city can not be enjoined from enforcing its payment. *Ib.*

Property sold for taxes must have been previously advertised three times within ten days in the official journal, or where such publication can not be made, public notice for ten days must have been given of the sale. A sale made before the lapse of ten clear days from the first notice, or publication, is fatally defective.
Renshaw, Cammack & Co. vs. *Imboden, 661.*

The tax sale of property to the highest bidder for a price less than the amount of the accrued State taxes, with the penalties, costs, charges, and expenses included, is an absolute nullity; and a transfer under such sale may be disregarded by any creditor of the owner of the property. *Ib.*

Where no seizure is made by a tax collector, it is immaterial whether the twenty days personal notice to the delinquent, required by the statute of 1879, is given, or not. The law requires only the fifteen days general public notice by the collector, of the places in the parish where he will be present to collect taxes, to put the taxpayers in default. After that, and only in case he seizes the property of a

TAXATION, AND EXEMPTION FROM—Continued.

delinquent, is the latter entitled to twenty days personal notice previous to the seizure. *Walters* vs. *Duke*, 668.

A retail merchant who carries on business in more than one store must pay a separate license tax on each store; and if he sells liquors, etc., in less quantities than a gallon, but not less than a wine bottle, he must pay an additional license tax as retail liquor dealer. *Ib.*

A license tax is not a tax on property, and hence is not affected by the limitation on the power of a parish to impose taxes on property. *Ib.*

Foreign insurance companies issuing policies from their own domiciles, who do not carry on business here, who have no agent here, and who only agree to accept risks placed for them by a person residing here, can not be compelled to pay a license tax to the city of New Orleans in virtue of an ordinance which imposes a license of $1000 on "every agency doing insurance business in said city, for any insurance company or companies not therein located, for each and every company by said agent represented." Foreign companies are amenable to said tax who do business here through an authorized agent. *City of New Orleans* vs. *Rhenish Westphalian Lloyds*, 781.

The city of New Orleans has no right to require that persons owning vehicles for hire within its limits, and who have paid their city licenses shall obtain from the city, at a certain fixed and exorbitant price, the plates which an ordinance of the city has prescribed for the convenient identification of the vehicles. Such an exaction is another license, in disguise, and therefore unconstitutional. *Walker* vs. *City of New Orleans*, 828.

See New Orleans vs. Becker, 644.

See Goldsmith vs. New Orleans, 646.

TAX COLLECTORS.

The Auditor of the State has no power to extend the time fixed by law for the settlement of State tax collectors, who are defaulters from the moment they fail to make their settlements at the time fixed by law. *The State* vs. *Lanier*, 423.

No legal action taken by the Attorney General against a State tax collector, a month after the latter had become a defaulter for not paying funds of the State into the treasury, can make the collector a forced custodian of the funds. *Ib.*

A tax collector in default for not paying over State funds collected by him, and the sureties on his bond, are liable for the full amount of those funds subsequently lost through a robbery of the collector,

TAX COLLECTORS—Continued.

when the evidence shows that the robbery could have been avoided by the exercise of ordinary care and diligence on his part. *Ib.*

A State tax collector has the right to appoint deputies.

Walters vs. *Duke, Tax Collector*, 668.

A defaulting tax collector can not offer in evidence delinquent rolls of former years, not verified by the oath of the collector, and which are, moreover, fraudulent.

Police Jury Vermilion Parish vs. *Brookshier, Tax Collector*, 736.

After a tax collector has acted under the ordinances of a police jury, and collected the taxes laid by them, he nor his sureties can contest the legality of those ordinances. *Ib.*

The tax collector of a parish has no right to pay, out of taxes collected by him, a judgment against the parish. *Ib.*

A defaulting tax collector is entitled to recover nothing for his services, and hence can not prove the value of those services. *Ib.*

A tax collector is not entitled to a credit for election vouchers, or witness certificates, when it does not appear that they had not been received by him in payment of taxes. *Ib.*

A tax collector is *prima facie* liable for the whole amount of his assessment roll, and if he fails to pay in that amount at the proper time, the whole burden of proof is on him to show discharge, payment, or whatever other defense he may have, in extinguishment of his liability. *Ib.*

TAX SALES.

A tax sale of property which is afterward ratified by the former owner can not be treated as a nullity, no matter how many latent informalities there may have been in the sale affecting its validity. Such a sale, however voidable, is not void.

New Orleans Insurance Association vs. *Labranche*, 839.

See Taxation.

THIRD POSSESSOR.

See Mortgage.

TUTORSHIP.

See Minors and Tutors.

UNDER TUTORS.

See Minors and Tutors.

USUFRUCT.

The surviving widow is the legal usufructuary of the estate of her children inherited by them from their father, and as such she can not be compelled to give security.

Boisse and Husband vs. *Dickson et al.*, 741.

VENDORS AND VENDEES, RIGHTS AND OBLIGATIONS OF. See Sale.

WARRANTY.

The warrantor has a right to raise any legal defense against the plaintiff's demand, because his obligation is to protect the defendant against that demand. *Powell* vs. *Hayes et al.*, 789.

WIDOWS.

The surviving wife, whose husband died previous to the twenty-fifth of March, 1844, has no right of usufruct in the half of the community property belonging to the children of herself and her deceased huaband.

Rosalie Matchler et al. vs. *The Bank of Lafayette*, 120.

The fact that a surviving widow had been the concubine of her deceased husband does not impair her claim to the sum allowed by law to widows in necessitous circumstances.

Margaret Sabalot vs. *Chas. Populus, Testamentary Executor*, 854.

The claim of a creditor in virtue of a conventional mortgage executed after the passage of the homestead law, is inferior to widow's claim under that law. The fact that the money lent by the creditor, and secured by the mortgage, was used to pay the taxes on the property, can not affect the priority of the widow's claim. *Ib.*

WILLS.

A legacy left to a minor grandchild of the testator on condition that the property composing the legacy shall remain under the administration of the testator's executor until the legatee's majority is a valid disposition, and the father of the minor, as natural tutor, has no right to claim the administration of the property.

Succession of Eliza P. Macias, 127.

The fact that there are witnesses to an olographic will does not invalidate it, nor deprive it of its olographic form.

Succession of Ella Roth—Probate of Will, 315.

The declarations of two credible persons, that they recognize the handwriting of a will as that of the testator, and who derive their knowledge that it is his handwriting from having often seen him write and sign during his life-time, are essential to the probate of an olographic will. *Ib.*

But if the probate of a will is contested, and the testimony of two persons thus deriving their knowledge of the handwriting of the testator is supplied, such testimony may be supplemented and strengthened by the production of original writings and the evidence of experts by comparison. *Ib.*

Women are absolutely incapable of being witnesses to testaments, but

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they are competent witnesses to prove the handwriting of a testator, when that fact has to be established on the probate of a testament. *Ib.*

Where a testator bequeaths all his property to his legatee, but qualifies the disposition by adding that the property is "to be used, enjoyed, and occupied," during the natural life of the legatee, nothing is devised but the usufruct of the property. *Succession of Law*, 456.

A testamentary disposition which gives the usufruct of certain movables and immovables to one person who is charged with their preservation and the full property of the same, after the usufruct's death, to another person, and in case of the latter's death gives the property to still another person, is a valid disposition. It does not involve a prohibited substitution. *Ib.*

Where the intention of the testator, as to the quantity of interest devised to different legatees, can be ascertained with reasonable certainty by the terms made use of by the testator in his will, those terms will be relied on for determining what the intention was. But if those terms leave the testator's intention doubtful, extrinsic evidence may be admitted to explain and interpret the intention. And in case of any remaining doubt as to the quantum of interest disposed of, that interpretation will be adopted which approximates closest to the order of distribution fixed by law. *Burthe* vs. *Denis*, 568.